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Letter dated 14 November 2001 from the Permanent Representative of Uganda to the United Nations addressed to the President of the Security Council

I have the honour to report as follows. Following publication of the report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo (see S/2001/357), the Security Council made a number of decisions and observations. Among these was to urge Governments named in the report to conduct their own inquiries into those allegations.

Uganda set up a Judicial Commission of Inquiry on 23 May 2001 and, as a result of this inquiry, an interim report has been published, of which I have the honour to enclose a copy for your information (see annex).* The final report should be expected soon.

I would be grateful if this report could be brought to the attention of the members of the Council and circulated as a document of the Security Council.

(*Signed*) Semakula **Kiwanuka**
Ambassador Extraordinary and Plenipotentiary
Permanent Representative of Uganda to the United Nations

* The annex is being circulated in the language of submission only.

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Annex to the letter dated 14 November 2001 from the Permanent Representative of Uganda to the United Nations addressed to the President of the Security Council

JUDICIAL COMMISSION OF INQUIRY

INTO

ALLEGATIONS INTO ILLEGAL EXPLOITATION OF NATURAL RESOURCES AND OTHER FORMS OF WEALTH IN THE DEMOCRATIC REPUBLIC OF CONGO 2001

(May – October, 2001)

Legal Notice No. 5/2001

INTERIM REPORT

OCTOBER, 2001

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INTRODUCTION

This report is an Interim Report as a result of an inquiry made into the allegations contained in a UN Expert Panel report on the illegal exploitation of natural resources and other forms of wealth in the Democratic Republic of the Congo. The Expert Panel was appointed by the Secretary General at the request of the Security Council. It produced a report which was submitted to the Security Council on 16th April, 2001. In that report, the Expert Panel alleges that there has been illegal exploitation of Congolese natural resources by individuals, governments and armed groups; and that the Government of the Republic of Uganda was one of those involved.

The Security Council considered the Panel report and made a number of decisions and observations. It noted that the report contained disturbing information about the illegal exploitation of Congolese resources. It took note of the action plan of the Expert Panel for time extension of the Panel's mandate to allow it to conduct a follow-up investigation and to prepare an addendum to its final report. It also urged governments named in the report to conduct their own inquiries into these allegations..

Accordingly His Excellency the President of the Republic of Uganda, through his Minister of Foreign Affairs took urgent steps to implement the decision to set up an inquiry.

It should be clearly understood that, although this Commission's inquiries are at an advanced stage, it is not able to answer all the questions asked of it. This Interim Report is directed at Legality, involvement in illegal activities by the Ugandan Government, His Excellency the President and Members of his family only, although other issues have had to be addressed to deal with these matters.

Even so there remain outstanding issues, particularly with regard to members of President Museveni's family

ESTABLISHMENT OF THE COMMISSION

On 23rd May 2001, the Minister of Foreign Affairs issued Legal Notice No.5 which was published as Supplement No.23 in the Uganda Gazette of 25th May 2001, and by which the Minister established the Commission of Inquiry (Allegations into Illegal Exploitation of Natural Resources and other Forms of Wealth in the Democratic Republic of Congo) 2001.

1 MEMBERS:

The Commission consisted of the following persons:

Hon. Justice David Porter	:	Chairman
Hon. Justice J.P. Berko	:	Member
Mr. John Rwambuya retired Senior UN official	:	Member
Mr. Bisereko Kyomuhendo Principal State Attorney	:	Secretary to Commission
Mr. Alan Shonubi, Advocate	:	Lead Counsel

The Commission was ably assisted by Dr. Henry Onoria particularly on International Law and Mr. Vincent Wagona from the office of the Director of Public Prosecutions.

2 TERMS OF REFERENCE

The terms of reference of the Commission are as follows; _

- to inquire into the allegations of illegal exploitation of natural resources and other forms of wealth of the Democratic Republic of Congo, to wit minerals, coffee, timber livestock, wildlife, ivory, moneys or other property from the Democratic Republic of Congo contained in the said report.

- To inquire into the allegations of mass scale looting and systematic exploitation of natural resources and other forms of wealth from the Democratic Republic of Congo by the Government of Uganda made in the said report;

- To inquire into allegations of complicity or involvement by His Excellency the President and his family in the alleged illegal exploitation made in the said report;

- To inquire into allegations of involvement in the illegal exploitation of the natural resources of the Democratic Republic of Congo by top ranking UPDF officer and other Ugandan individuals named in the said report.

3 TIME FRAME OF THEINQUIRY

The Commission was required to submit a report of its findings and recommendations to the Minister responsible for Foreign Affairs within three months after commencing duties.

The Commissioners were sworn in on 4th June 2001, but because of logistical set backs, they did not open public hearings until 12 July 2001. The intervening period was spent in preparing office, acquiring equipment, recruiting secretariat, collecting and reading source documents and relevant data (such as the UN Panel Report) and interviewing, selecting and summoning witnesses.

4 CONSTRAINTS/LIMITATIONS

The Commission has experienced various constraints in its task. One of the major snags was the lack of sources of information. Although the Panel was able to accept unsworn, and often hearsay evidence, this Commission is forced by The Commissions of Inquiry Act to work only with sworn evidence.

The Commission had hoped for the Panel's assistance in providing some of the sources it had not included in its report, but disappointingly, this was not the case. In refusing to share with this Commission their source of information, the Panel made it clear that it was the policy of UN not to disclose such sources in its reports.

Other constraints included unwillingness by witnesses interviewed to tell all they knew, inefficiency of some officials or poor record keeping, fear of self incrimination in instances of corruption and in some cases fear of reprisal. Also financial shortage, bureaucracy in releasing approved funds and limited time for completing the tasks had an adverse effect on the work of the Commission.

5 METHODOLOGY

In conducting its inquiry, the Commission looked at its task as one of inquiry and investigation rather than that of prosecution or defence of any one who appeared before it. The hearing was conducted in public and evidence was given on oath. Witnesses were free to be accompanied or assisted by counsel before the Commission, if they so wished. The Commission utilized two types of information for its inquiry: documentation and evidence.

Documentation:

Abundant documents were available to the Commission. They included;

- Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and other Forms of Wealth in the Democratic Republic of the Congo, dated 16th April 2001.
- Response by the Government of the Republic of Uganda to the above report dated 23 April 2001.
- Statement by H.E President Museveni about the UN Panel Report dated 3 May 2001.
- Legal Notice issued by the Minister of State for Foreign Affairs/Holding the Portfolio of Minister of Foreign Affairs, dated 23 May 2001, establishing the Commission and terms of reference therein.
- The Commission of Inquiry Act, cap. 56 of the Laws of Uganda as amended by Statutory Instrument 200 of 1965.
- Sections 89 and 93 of the Penal Code Act.
- Lusaka Agreement 1999 (and subsequent protocols).
- [A list of other relevant documents is given in Annex I Exhibits:

Evidence

Virtually all Ugandans and some non-Ugandans mentioned in the Panel report provided evidence on oath. They included His Excellency President Museveni, the Defence Minister, Mr. Amama Mbabazi, the Army Commander, Major Gen. J. J. Odongo, the Secretary of Defence, Dr. Ben Mbonye, the

Chief of staff, Brig. James Kazini, Major Gen. Salim Saleh (Caleb Akandwanaho). Also interviewed were Government officials from various Ministries and institutions. They produced and defended or explained data and reports presented to the Commission. This enabled the Commission to cross check or compare the figures or sources with those given in the Panel Report.

Other witnesses volunteered to share the information they had and others appeared in response to the Commission's appeal to the public to come forward and give evidence. Unlike the UN Panel of Experts, the Commission's terms of reference restricted its task to the allegations relating to Uganda and the Democratic Republic of the Congo. [A full list of witnesses is given in Annex II Witnesses]

6 RULES OF PROCEDURE

While the Commission was empowered to adopt its own rules of procedure, it on the whole adhered to the Evidence Act (cap.43).

7 WORKING HOURS

The working hours of the Commission were from 8:30 a.m. to 5:30 p.m. from Monday to Friday of each week. Public hearings were normally conducted between 9:00 a.m. and 5:30 p.m.

8 PLACE OF WORK

The Commission's office was located in suites 102-104 Nile Hotel International Conference Centre.

9 SECTIONS OF EVIDENCE

The evidence gathered was divided in the following briefs;

1. Background to Uganda involvement in the Congo.
2. Exploitation allegations pertaining to timber – Dara Case Study and other timber related allegations.

3. Exploitation allegations pertaining to minerals, diamonds, gold, cassiterite, other minerals and economic data.

4. Exploitation allegations pertaining to coffee, livestock, wildlife, ivory, money and other property.

5. Exploitation allegations pertaining to mass scale looting systematic and systemic exploitation.

6. Allegations against His Excellency the President and his family in alleged illegal exploitation.

7. Exploitation by individuals and top UPDF officers named in the report.

8. Upcountry considerations and evidence

These were generally intertwined in such a way that the evidence in one brief could also appear in another brief or, to some extent, be mentioned in another.

CONSIDERATION OF THE UN PANEL REPORT

10 ILLEGALITY.

This Commission has read paragraph 15 of the report of experts on illegality. Bearing in mind that there are pending proceedings before the International Court of Justice between the Democratic Republic of Congo and Uganda, this Commission takes the view that it would be wrong to attempt a full definition of illegality in the content of exploitation of resources in the Democratic Republic of Congo .

The UN Panel Report defined four concepts of illegality:-

10.1 Violation Of Sovereignty

The history of Zaire now the Democratic Republic of Congo since independence has been characterised by the seizure of power by military means. There is no doubt that, even before the rebellion in 1996 Kinshasa had little or no control over the Eastern the Democratic Republic of

Congo, and that to all intents and purposes, apart from the technical drawing of lines on a map, in practice these were different countries.

The point about sovereignty is that consideration of it falls into two headings:-

.1 OF 10/.1 WHETHER THE UPDF SHOULD HAVE GONE INTO THE DEMOCRATIC REPUBLIC OF CONGO.

Our consideration of the evidence shows that the original incursion into the Democratic Republic of Congo was by consent between Uganda and the Laurent Kabila government. It has been shown that movement across the Democratic Republic of Congo over the period of a year was strategically necessary from Uganda's point of view, and this Commission has said that in view of the outstanding ICJ case, and will not attempt finally to decide the matter. However, there are many examples from up-country visits of breach of Uganda's sovereignty, prior to the first incursion by the UPDF, by groups actively supported and sheltered, first by the Mobutu regime, and later by the regime of Laurent Kabila.

However, whether or not the movement across the Democratic Republic of Congo was legal or illegal under International Law is irrelevant to the consideration of exploitation of the resources of the DRC, because exploitation would be by trade, and this Commission has been advised that even during an illegal occupation, trade is not affected (see Annex III Paper on Illegality and International Law).

.1 OF 10/.2 WHEHER BUSINESSMEN AND INTERNATIONAL COMPANIES MAY TRADE IN A WAR ZONE WITHOUT COMPROMISING THE SOVEREIGNTY OF THE COUNTRY

Even if it were to be argued that Uganda's presence in the Democratic Republic of Congo is unlawful on the basis of UN resolutions, this does not necessarily imply that commercial activities in the Eastern Part of the Democratic Republic of Congo should be deemed illegal. For International Doctrine and practice admits of the continuity of the political, socio-economic and cultural life of the people and communities in territory occupied. Trade by businessmen and International Companies is only a facet of that continuity

10.2 Respect By Actors Of The existing Regulatory Framework

There is no doubt that since 2nd August 1998, the Kinshasa Regime has never had effective control in the Eastern and North Eastern the Democratic Republic of Congo . This was a mere reflection of the situation which prevailed before the rebellion against the Mobutu regime. Therefore the authorities exerting effective power and control over the Eastern and North Eastern the Democratic Republic of Congo after August 1998 were the various rebel groups.

This Commission is surprised to see, in paragraph 15(b) of the Report, the suggestion by the UN Panel that rebels in effective control of an area somehow adopt the title of "sovereignty" over that area. Our view is that sovereignty is indivisible and relates to the whole of the Democratic Republic of Congo . This Commission thinks that the UN Panel was ill advised to use this phraseology.

The Panel appears to say on the one hand that breach of sovereignty is illegal, and on the other hand that rebels exerting effective power and control over an area can set up a regulatory framework to govern the use and exploitation of natural resources in that area. The two are incompatible.

This Commission is inclined to the view that Congolese, in effective control of territory, who set up or adopt a regulatory framework, commit no breach of sovereignty, and therefore that regulatory framework must be obeyed by traders and businessmen who operate in that territory. It is not for those traders or businessmen to look into application of taxes, merely to comply with the regulations.

10.3 Use And Abuse Of Power

The UN Panel gives five examples of abuse of power :

.3 OF 10/.1 FORCED MONOPOLY IN TRADING

Forced monopoly should not be confused with price fixing in the ordinary course of trade. For example in the coffee trade, quite often coffee buyers will provide sacks, either free or at a price, for the growers: this is an advantage to both parties: clean coffee for the trader, and facilitation of packing for the growers. However, coffee prices will be fixed by the buyers, and the fewer buyers there are, the more like a monopoly this will look : but such a practice is in the ordinary course of business. (see Panel Report paragraph 65)

Similar practices exist in the tobacco industry, where seed money, fertilizers, chemicals and hand tools are provided, recovered from the farmer through tobacco prices.

but where the circumstances amount to a use of military force as suggested under paragraph .3 of 10/ 4 below, this should be considered as illegal.

3 OF 10/ 2 UNILATERAL FIXING OF PRICES OF PRODUCTS BY THE BUYER

In view of the practices in the coffee and tobacco trade, this Commission cannot agree that this involves illegality.

3 OF 10/ 3 CONFISCATION AND LOOTING OF PRODUCTS FROM FARMERS

These would obviously be rightly considered as illegal.

3 OF 10/ 4 USE OF MILITARY FORCES IN VARIOUS ZONES TO PROTECT SOME INTEREST OR TO CREATE A SITUATION OF MONOPOLY.

Once again one has to distinguish circumstances. There is a great deal of difference between provision of security in the general sense, which enables a businessman to trade advantageously, and specific protection of interests for the benefit of a particular party. To satisfy this commission's conditions of work, this Commission would need evidence of specific instances.

3 OF 10/ 5 VIOLATION OF INTERNATIONAL LAW INCLUDING "SOFT" LAW.

In paragraph 15 (d), the Panel considered that business activities carried out in violation of international law were illegal, and included "soft" law in that definition.

This Commission has received a great deal of evidence relating to import, export and transit of timber. Certification of timber is an example of "soft" law, and the only one referred to in the Panel Report.

On the basis of evidence this Commission has received there is no doubt whatever that, although the international community quite rightly promotes proper forest management for the protection of the environment, and uses certification as a powerful tool to that end, nevertheless in commercial terms the difference between certification and non certification amounts to a difference in price only, and as a matter of fact, companies involved in the timber trade will use certification where they can, but will nevertheless sell uncertified timber where certification is not possible or too expensive.

It is difficult to describe an act as illegal unless there is some penalty attached to the performing of the act, which is not the case for certification of timber, and this Commission doubts that the Panel of experts was correct in including "soft" law in their definition of illegality.

This Commission does not think that the definition of illegality is quite as simple as the Panel of Experts has set out in the report.

On the basis of the response of the Republic of Uganda, and that of His Excellency President Museveni, this Commission takes the view that there are many considerations which the Panel did not include, some of which are implicitly recognised in documents such as the Lusaka Agreement to which the Panel does not refer throughout the Report. This omission was unfortunate, because there is no doubt that the Lusaka Agreement recognizes and legitimizes the various rebel groups, and their administrations. The agreement itself is witnessed by major nations and representatives of the UN and recognized and being implemented by the UNSC.

As this Commission understands the position of the Government of the Republic of Uganda, and the case put forward by His Excellency the President in their respective responses, there is a level of trade which must be expected to continue whatever the political situation, and for which provision must be made during times of trouble. In respect of a country like the Democratic Republic of Congo, which on the Eastern side is in practice landlocked due to the difficulty of communication with Kinshasa, and indeed Uganda itself, cross-border trade is a fact of life, and in some cases is the support of life itself.

Control of that level of trade must be allowed to be exercised by whoever is in de facto control of the area in question. Coffee, for instance, grows, is picked, dried, packed and stored: but it does not wait for politicians to settle their differences. A market must be found for it before it goes off. If that market is across the border of another country, then that is where it will be sold, whatever the rules of an administration thousands of kilometres away, which has no de facto control over the area where the coffee was grown.

At a higher level of trade, such as mineral resources, wherever there are such resources, there will be miners to mine them. Those miners have to make a living, and in order to do that they have to sell what they mine. There have been earlier precedents of rebels while in de facto control, granting concessions to companies based in other countries, before being successful and later forming the government. The UN Panel Report cites concessions granted to Zimbabwean companies during

Laurent Kabila's rebellion against Mobutu.

11 EXPLOITATION

This Commission has also read the Panel's definition of exploitation in paragraph 16 of the Panel Report. Once again, this Commission hesitates to enter upon a full definition of the word for the same reason as above. However the word itself does not bear the overtones of illegality with which it has been used in the present context. It is perfectly normal to exploit a forest, or a Gold Mine or a diamond mine in the ordinary course of trade. Many national or international companies enter onto the sovereign territory of another country than their own in search of opportunities for exploitation of natural resources. It is the question of illegality which should bring such actions to the attention of the international community.

12 BACKGROUND AND PRE-EXISTING STRUCTURES

In Paragraph 23 of the Panel of Experts Report, the Panel recites the outbreak of war between Zairean forces and the AFDL, a rebel movement led by the late Laurent Kabila. The Panel recites that the AFDL was supported by the Angolan, Rwandan and Ugandan forces.

The Panel leaves the impression that Ugandan forces marched with the AFDL, certainly in the Eastern Zaire. The Panel develops that point in the following way in paragraph 23:

> *"This AFDL-led conquest of then eastern Zaire fundamentally altered the composition of the regional stakeholders and the distribution of natural resources. Previously, the distribution norm was (via legal and illegal channels) through locally based Congolese, mostly civilian-managed, business operations. However, these traditional modes were quickly overtaken by new power structures. Along with new players came new rules for exploiting natural resources. Foreign troops and their "friends" openly embraced business in "liberated territories", encouraged indirectly by the AFDL leader, the late President Kabila."*

And in paragraph 26 and onward, under the heading "Pre-existing structures that facilitated illegal exploitation":

"26. Illegal exploitation by foreigners aided by the Congolese began with the first "war of liberation" in 1996. The AFDL rebels, backed by Angolan, Rwandan and Ugandan soldiers conquered eastern and south-eastern Zaire. As they were advancing, the n AFDL leader, the late Laurent-Désiré Kabila, signed contracts with a number of foreign companies. Numerous accounts and documents suggest that by 1997 a first wave of "new businessmen" speaking only English, Kinyarwanda and Kiswahili had commenced operations in the eastern Democratic Republic of the Congo. Theft of livestock, coffee beans and other resources began to be reported with frequency. By the time the August 1998 war broke out, Rwandans and Ugandans (top officers and their associates) had a strong sense of the potential of the natural resources and their locations in the eastern the Democratic Republic of the Congo. Some historians have argued that Ugandan forces were instrumental in the conquest of areas such as Watsa, Bunia, Beni and Butembo during the first war.

27. Numerous accounts in Kampala suggest that the decision to enter the conflict in August 1998 was defended by some top military officials who had served in eastern Zaire during the first war and who had had a taste of the business potential of the region. Some key witnesses, who served with the Rally for Congolese Democracy rebel faction in early months, spoke about the eagerness of Ugandan forces to move in and occupy areas where gold and diamond mines were located. Other sources informed the Panel that, late in September 1998, they were already engaged in discussions with General Salim Saleh on the creation of a company that would supply the eastern Democratic Republic of the Congo with merchandise, and on the import of natural resources. The project never materialized in this form, but the sources reportedly also discussed this and other business venture possibilities with the President of Uganda, Yoweri Museveni.

There are strong indications that, if security and political reasons were the professed roots of the political leaders' motivation to move into the eastern Democratic Republic of the Congo, some top army officials clearly had a hidden agenda: economic and financial objectives. A few months before the 1998 war broke out, General Salim Saleh and the elder son of President Museveni reportedly visited the eastern Democratic Republic of the Congo. One month after the beginning of the conflict, General James Kazini was already involved in commercial activities. According to very reliable sources, he knew the most profitable sectors and immediately organized the local commanders to serve their economic and financial objectives. "

As this Commission understands the Panel's argument, leaving aside for the moment alleged personal involvements, and endeavouring to separate alleged Ugandan and Rwandan involvement, which unfortunately the Panel failed to do, the Panel say:

1. Ugandan top Officers gained experience of business potential in the Congo because they supported the ADFL in Eastern Congo during Laurent Kabila's rebellion against President Mobutu, while conquering East and South East Zaire

2. Top Military officials in the UPDF who had served in Eastern Zaire in 1996 argued for Uganda's involvement in 1998 for their own selfish ends

3. The Panel acknowledges that political leaders might have been motivated to

move into the Congo for security and political reasons: however top army leaders had a hidden agenda : economic and financial motives

Reference to the transcript of evidence will quite clearly show that, so far as Uganda was concerned, while the AFDL, together at least with the Rwandan army, if not the Angolan army, swept across the country, and finally attacked and took Kinshasa, the UPDF was concerned with dealing with incursions into Uganda at Uganda's northwestern border with the Sudan and Zaire. The UPDF therefore went into Zaire at its North Eastern-most point, and pursued West Bank Nile Front rebels successfully. Thereafter, the UPDF was withdrawn from Zaire. This Commission was told that this was a short campaign and that the UPDF moved quickly.

There is some evidence that Uganda provided extremely limited assistance to the Rwandans, by detaching a pilot to fly Rwandan soldiers on quick response in a plane chartered by Rwanda. The pilot has told this Commission that he never flew Ugandan troops. Uganda's ambassador to Kinshasa told this Commission that, although he was away at the time of the fall of Kinshasa to Laurent Kabila, he returned only ten days later to witness the swearing in of Laurent Kabila, and he saw no sign of Ugandan troops.

All of this evidence is supported by the evidence of ministers and permanent secretaries responsible at the time, and this Commission, in default of representation for the opposing view, has been forced to descend into the arena and put the points raised in the Panel Report strongly to the witnesses who have come before it.

On point 1 above, on the evidence which this Commission has heard, this Commission finds as a fact that there is no indication whatever that in 1998 "Ugandans (top officers and their associates) had a strong sense of the potential of the natural resources and their locations in the Eastern Democratic Republic of the Congo" due to their earlier experiences, because the earlier experiences were in North Eastern Zaire, rather than Eastern Zaire.

On point 2 above, it is beyond contest that in April 1998, Uganda's Ambassador to Kinshasa had briefed His Excellency the President on the situation in the Congo after several visits to the border area and discussions with traditional chiefs, opinion leaders and local authorities in Beni and Irumu: there were also intelligence reports from UPDF Intelligence. The situation was that ADF, NALU, EX-FAZ, EX-FAR and WNBF were operating along the common border. Vehicles stolen from

Uganda were ending up in the Congo. ADF, EX-FAZ and EX-FAR were getting support through Sudan. On this side of his report, the Ambassador recommended a military solution in addition to a political one : as a joint operation between Uganda and the Democratic Republic of Congo to get rid of the armed groups.

There was a Ministerial Meeting on Security and Refugee Matters between Uganda and the Democratic Republic of Congo on 7.4.98 in Kampala. Uganda recommended Joint Command for the UPDF and the ADFL, with increased deployment of ADFL on the border, and other cooperative measures: the Democratic Republic of Congo preferred joint operations rather than joint command. However, there was a clear understanding of the problems of security, and acknowledgement of the problem. The language of the discussion clearly indicates that the Democratic Republic of Congo expected any joint command to include "foreigners into the affairs of a foreign state"

A joint communiqué was prepared on 26th April after a meeting between Ministers, in which it was stated that there was agreement on ways and means to eradicate insecurity, although no details were spelt out.

Thereafter at a date late in April, a Protocol was drawn up at Kinshasa in which the two parties (Uganda and the Democratic Republic of Congo) recognised the existence of enemy groups which operate on either side of the common border. Consequently the two armies agreed to "co-operate in order to insure (sic) security and peace along the common border".

It was at about this time probably, on the evidence this Commission has heard, that shortly before the Protocol, the UPDF went into the Democratic Republic of Congo, with a force of three battalions in three places, Bukira, Buswaga and Lhume. When they did that they met no resistance from the ADFL: and presumably, whatever the political situation, it follows that the two armies were in agreement to this action: which the politicians appear to have attempted (unsuccessfully in this Commission's view) to legalise in meetings and by the drafting of the Protocol which this Commission has referred to above. The circumstances shown by the evidence amount to a genuine invitation to Uganda to take part in security operations over the border.

Now this does not sound to this Commission like a collection of gung-ho top military commanders wanting to dash off into the Democratic Republic of the Congo to make money, and persuading even their commander-in-chief, whose decision it finally must have been, to agree with them, and commit Uganda to the danger and expense of occupation of another

country. There were sound reasons for the concerns of both countries, and the action Uganda took was as a result of discussions and agreement.

There was a problem of security, to which the Panel does not refer: there clearly were discussions and agreements of the most open kind: all these documents were available to the Panel. This Commission thinks that, taken together with this Commission's finding on Point 1, it cannot be said either that the Government of Uganda acted for any other motive than for security and political reasons: and this finding also deals with Point 3 above.

As to Point 4 above, these allegations should not be dealt with here, as this Commission is trying to consider overall policy and the actions of Government. However, in view of what has been said above, this Commission doubts that this is a correct conclusion.

13 PRE-EXISTING STRUCTURES THATFACILITATED EXPLOITATION

13.1 Transportation Networks

In the UN Panel report at Paragraph 31, the comment is made that aircraft fly from the military airport transporting arms, military equipment, soldiers and, for some companies, merchandise. On the return flights, they will carry coffee, gold, diamond traders and business representatives, and in some cases soldiers.

A great deal of this Commission's time has been taken up trying to investigate what was going on at Entebbe Airport. Restricting this Commission's conclusions to flights in and out of the military airport, this Commission has discovered that at various different times, both military planes and private commercial planes were operating from the airport. On the basis of CAA data it is quite clear that the private flights outnumbered the military flights by a large number.

The Ministry of Defence at one time was operating its own plane, at another chartering aircraft. There are some limited examples which appear from the manifests this Commission has been able to collect that military flights were occasionally assisting private businessmen, and occasionally private charters were assisting the Ministry of Defence . But generally these flights were operating separately.

The justification for private flights operating from a military airport was that they were flying to a war

zone, and therefore needed to be under military control: and further, the policy of He the President was to assist as a humanitarian act trade with the Democratic Republic of Congo to be facilitated.

14 ALLEGATIONS AGAINST THE GOVERNMENT OF UGANDA

In Paragraph 31 of the Report, that the Government of Uganda permitted these flights to facilitate the exploitation of natural resources of Congo.

The problem here is a matter of perception. What was happening was two entirely separate operations, one private and the other military. It would have been easy for an observer to assume that all operations were military, because the planes used do not carry any special markings, for instance camouflage, and the Ministry of Defence planes were not armed.

Having made that incorrect assumption, that all operations were military, the observer would wrongly conclude that military officials were carrying out enormous amounts of trade at the military airport. So far as this Commission can tell, that was not the case, although the investigations are not yet complete. By far the largest number of flights were private, carrying merchandise to and from the Congo. This Commission actually saw an Antonov Aircraft carrying a cargo of 19 tons of Cocoa for Unilever land during the visit to the airport. It was using the military airport, and had dropped passengers from the Democratic Republic of Congo at the International Airport for Immigration and Customs formalities. It was met by Customs officials when it taxied over to the military installation.

This Commission has to say, however, that it is not convinced that military planes were not carrying merchandise for senior officers from the Congo. In the examination of the officers involved, this Commission was faced with a conspiracy of silence. The only cargo this Commission could trace as having been flown back from the Democratic Republic of Congo in a military airplane was on two occasions loads of coffee owned by Jean Pierre Bemba.

15 ALLEGATIONS AGAINST GEN SALIM SALEH

Gen Salim Saleh was criticised for visiting the Eastern the Democratic Republic of Congo before the 1998 war broke out. Gen Saleh told this Commission on oath that he had never visited the Eastern the Democratic Republic of Congo, but that he had gone to Kinshasa at the invitation of Laurent Kabila, and there discussed trade possibilities, and in particular air services. This was at a time when there was every reason to count on the co-operation of Laurent Kabila, and this Commission sees no

problem in such matters as trade being discussed at that time.

16 ALLEGATIONS AGAINST KAINERUGABA MUHOOZI

This is the only time Lt Muhoozi's name is mentioned in the whole report. Before this Commission Lt Muhoozi said that he went, not to Eastern the Democratic Republic of Congo but to Kinshasa on two occasions. The first was in 1997, during the regime of Mobutu, when he went to look for a market for meat products on behalf of his family ranch, which is well known for the keeping of cattle and the need for a market. The second occasion was in early 1998 when he had started working for Caleb International, Salim Saleh's firm, for discussions with some potential partners in the Democratic Republic of Congo with the possibility of developing some mining interest there. This was during the regime of Laurent Kabila, when friendly relations were thought to exist between the Kinshasa Government and Uganda.

This Commission is fully satisfied that these were genuine visits during peacetime to promote international trade, and this Commission cannot understand why they appear as criticisms in the UN Panel Report.

17 MASS SCALE LOOTING

The UN Panel Report states as a general proposition that between September 1998 and August 1999, occupied zones of the Democratic Republic of Congo were drained of existing stockpiles.

Ugandan soldiers under Gen Kazini were accused of having, in late August 1998 absconded with stockpiles of Timber belonging to Amex Bois. The Report does not state whether Gen Kazini was present at the time. This Commission has been able to investigate this allegation to some extent. This Commission found on the evidence that only a short time after this was supposed to have happened, Amex Bois was transitting quantities of timber through Uganda: and wonders, if Amex Bois was drained of stockpiles of timber, how they were able to replenish their stocks so quickly. This creates a serious doubt in this Commission's minds as to the truth of this allegation. One suggestion given to this Commission on oath is that some UPDF soldiers had used a little of the timber for firewood, falling far short of draining the stocks.

Gen Kazini was also alleged to have ordered the confiscation of stockpiles of timber of La Forestiere in December of that year. The Panel rely on an allegation that Gen Kazini was seen in the area at the time of the alleged incident. In fact when Gen Kazini left La Forestiere, he obtained a withdrawal document signed by the relevant authorities which stated that La Forestiere had no such complaint.

In January 1999, Jean Pierre Bemba with Gen Kazini was alleged to have organized a large operation for the confiscation of coffee beans. The recital of information upon which the Panel relied deals with acts of Jean Pierre Bemba, but does not implicate Gen Kazini.

It is further alleged that :-

> *"Cars and other items were apparently also taken from the country, as the statistics on Ugandan registered cars reflected an increase of about one quarter in 1999".*

The assumption that the increase in registered cars in Uganda at the relevant period represented cars stolen from the Democratic Republic of Congo was obviously wrong as it ignored completely other probable sources from which the increase could have come.

Besides, the information this Commission has received from Interpol Data Base shows that the number of stolen vehicles that were recovered by Uganda and handed over to the Democratic Republic of Congo between 1998 and 2001 was only three.

If the allegation were true, there would have been a significant number of left hand drive cars in the streets of Kampala. This Commission has evidence, and have observed ourselves, that this is not the case.

In Paragraph 42 it is alleged that in Bunia Congolese civilians were injured or murdered for resisting the attempted seizure of property by "RCD rebels and foreign soldiers". It is not clear whether this is an allegation against the UPDF, but the allegation is not sufficiently detailed to investigate, or to rely upon.

In Paragraph 43 and 44, the highest army commanders of Uganda are alleged to have encouraged, organized and coordinated looting, and in particular Gen Kazini is said to have appointed loyal commanders and reliable civilian Congolese to secure his network in areas rich in mineral resources. This Commission shall revert to this in the final report. The appointment of Adele Lotsove was quoted as an example, and is further dealt with in Paragraph 71. This Commission has

considered the matter at paragraph 18 below of this report.

In Paragraph 45 it is alleged that key officials in the Government of Uganda were aware of the situation on the ground: and further, in the case of gold, that the increased production would have alerted any government.

18 ALLEGATIONS AGAINST UGANDA

In relation to the allegations in Paragraphs 43,44, 68 and 71of the Panel Report relating to the appointment of Adele Lotsove, in paragraph 71 of the UN Panel Report it was stated that the illegal exploitation of natural resources was facilitated by the administrative structures established by Uganda and Rwanda. An example which the Panel quoted was the appointment as Governor of Ituri Province of Adele Lotsove on the 18th June 1999. This Commission has seen the letter of appointment among the exhibits: the only difference is that the letter is the appointment of a Provisional Governor. This Commission is however impressed by the terms of the letter of appointment, which exhorts the new Provisional Governor to act in a proper fashion, and the way in which she should approach her work is particularised. This Commission has been told that Brigadier Kazini was reprimanded for this act. In his defence he pointed out that, due to a split in the RCD factions, no one could agree on the necessary appointment of an administrative head for Ituri province, and he therefore thought it right to act to fill the vacuum. In fact, not only did he appoint a Provisional Governor, he actually created a new Province in defiance of organized opposition, leaving yet more disgruntled Congolese, and in defiance of the express command of his Commander in Chief. This Commission does not think that a reprimand was appropriate for this, especially when it was not entered on the officer's record as it was supposed to be: this Commission had asked for a copy of this, but have not been availed it. This Commission also thinks that warning flags were flying as to the capability of this officer to fill his very sensitive post.

As to the allegation that Madame Lotsove was instrumental in the collection and transfer of funds from her assigned administrative region to the Uganda authorities in 1999, this Commission has been interested in the mechanics of such a transfer of funds.

It would have helped this Commission in this Commission's work had the Panel named the authorities concerned. If local UPDF authorities were concerned, this Commission does not see how

it would now be possible to check any payments made. If government authorities in Uganda were concerned, this Commission does not see how any payments made could have reached Treasury without being recorded. In those circumstances this Commission is at a loss to work out what information gathered by the Panel could clearly indicate that such payments were made, and this Commission therefore doubts this conclusion.

It has proved impossible to trace or investigate the allegation in Paragraph 45, because the key officials and the source of information upon which the Panel relies is not given. In evidence on oath before this Commission, this allegation has been denied in toto.

19 SYSTEMATIC AND SYSTEMIC EXPLOITATION

In Paragraphs 46-54 of the Panel Report, the Panel allege that a company (Dara Forêt) used illicit business practices and complicity with occupying forces and the Government (presumably the Government of Uganda) as well as its international connections to exploit the natural resources of the Congo. The Panel conducted a case study which is alleged to support this proposition.

The allegations of impropriety concern Dara Forêt, Dara Great Lakes Industries and associated companies, and the Uganda Government.

19.1 TIMBER : DARA FOREST AND DARA GREAT LAKES INTERNATIONAL.

This Commission reproduces here the example according to the Panel Report. Evidence brought, and severely tested by this Commission, is interpolated together with this Commission's comments.

DARA-Forest case study. *A Ugandan-Thai forest company called DARA-Forest moved to the Ituri area late in 1998.*

Dara Forêt is a company registered in the Democratic Republic of Congo . Whilst it has Thai (5%) and Congolese (40%) Directors, it has no Ugandan Directors shareholders, or any other Ugandan Interest apart from a Ugandan Company named Royal Star Holdings, whose directors and shareholders (55%) are exclusively Thai Nationals.

In March 1998, DARA-Forest applied for a licence to carry out logging activities in the Democratic Republic of the Congo, but was denied a forest concession by the Kinshasa authorities.

Mr. John Supit Kotiran, the managing Director of Data Forêt, denied before this Commission that he had ever made any application to Kinshasa authorities. This Commission has no evidence of any such application.

In 1999, the company began to buy production by hiring individuals to harvest timber and then sell it to the company. Initially, these individuals were Congolese operating in partnership with Ugandans.

The evidence of Mr. Kotiran was that the company was buying individual trees from Congolese, with the assistance of Local Chiefs in the Congo. He was then shipping them in transit through Uganda (with the exception of a trial run of two containers which he imported to Uganda and in respect of which he has produced the relevant customs documents) to foreign destinations.

The same year, DARA engaged in industrial production with the construction of a sawmill in Mangina. By 2000, it had obtained its own concession from RCD-ML.

So far as this Commission can ascertain, this is correct.

Analysis of satellite images over a period of time reveals the extent to which deforestation occurred in Orientale Province between 1998 and 2000. The most harvested forests in the areas were around Djugu, Mambassa, Beni, Komanda, Luna, Mont Moyo and Aboro. This logging activity was carried out without consideration of any of the minimum acceptable rules of timber harvesting for sustainable forest management or even sustainable logging.

Timber harvested in this region, which is occupied by the Ugandan army and RCD-ML, has exclusively transited or remained in Uganda. Our own investigation in Kampala has shown that mahogany originating in the Democratic Republic of the Congo is largely available in Kampala, at a lower price than Ugandan mahogany. This difference in price is simply due to the lower cost of acquisition of timber. Timber harvested in the Democratic Republic of the Congo by Uganda pays very little tax or none at all.

There is no evidence before this Commission that Uganda as a country or as a Government harvests timber in the Democratic Republic of the Congo. This Commission doubts that the allegation in the Report is correct.

In addition, customs fees are generally not paid when soldiers escort their trucks or when orders are received from some local commanders or General Kazini. Timber from the Democratic Republic of the Congo is then exported to Kenya and Uganda, and to other continents. The Panel gathered from the Kenyan port authorities that vast quantities of timber are exported to Asia, Europe and North America.

The Panel also discovered during its investigation that individual Ugandan loggers violated forestry legislation, recognized by their ally RCD-ML, by logging (extracting) the timber directly. According to the Congolese legislation on the permis de coupe, *only individual Congolese nationals are allowed to harvest timber and only in small quantities. Foreigners must apply for the larger concessions. Initially, Ugandans operated in partnership with a Congolese permit holder. Soon, the Ugandans began to pay the Congolese to sub-lease the permit and, subsequently, to obtain the licence in direct violation of the law.*

In so far as the above relates to Dara Forêt, Mr. Kotiram has told this Commission that he has not yet cut a single tree within his concession. He has given good and sufficient reason for that, and this Commission will recite it in due course.

During a visit to Mpondwe/Kasindi and also at Arua/Ariwari, this Commission spoke to the Congolese Officers there, and they denied strongly that it would be possible for UPDF to influence the passage of merchandise, or for their commanders to give orders in that regard. It should also be pointed out that even if what is alleged was happening, there would be no customs fees payable on exit from the Congo, so the only loser would be Uganda. It is true that large quantities of timber transit Uganda for export to Europe and America., in the ordinary course of trade.

In so far as individual Ugandan loggers are concerned, this Commission has no way of investigating this non-specific matter. This Commission have had evidence that there are Ugandans who go over to the Congo and buy trees by negotiating with individual Congolese permit holders or Chiefs, and import the timber once cut to Uganda, which helps to account for the presence of Congolese hardwood in the Uganda market. This Commission was informed that the low price of Congolese hardwood is due to the fact that Congolese timber is harvested and cut with chain saws, while chain saws are not permitted in Uganda. The efficiency of chain saws accounts for the increase in cross border trade. This cross border trade has been carried on throughout living memory.

Timber extraction in the Democratic Republic of the Congo and its export have been characterized by unlawfulness and illegality. Besides extracting timber without authorization in a sovereign country and in violation of the local legislation, DARA-Forest consistently exported its timber without any certification procedure.

In this paragraph the Panel raise the whole question of de facto control of administration which this Commission has dealt with under the heading of ["Illegality" at 10 above].

It tried to approach some certification bodies licensed by the Forest Stewardship Council. These bodies requested documentation and elements that the company failed to provide.

Mr. Kotiram has told this Commission that he wants to gain certification for his concession in the Congo, for reasons which are to do with timber for his processing factory at Namanve in Kampala which is yet to be built. It is because certification has not yet been achieved that he has not cut any trees on his concession

Yet DARA-Forest exported timber in violation of a normal procedure generally required and accepted by the international forest community and gradually considered to be international "soft law". Companies importing this uncertified timber from DARA-Forest were essentially in major industrialized countries, including Belgium, China, Denmark, Japan, Kenya, Switzerland and the United States of America.

If companies so widely spread around the developed world are prepared to trade in uncertified timber, this paragraph lends weight to this Commission's conclusion under the title ["Illegality" at 10 above] that commercial practice is to trade in timber whether certified or not, but at different prices. It again raises the question of "soft law" which this Commission has considered in Paragraph .3 of 10/.5 above. Mr. Kotiram gave this Commission some interesting information: he said that there is no other company certified in Africa except one company in Gabon. This Commission does not know if that is true or not, but has no reason to doubt it. If so, then in Africa this cannot be said to be a "procedure generally required".

The Panel also realized that DARA Great Lakes Industries (DGLI), of which DARA-Forest is a subsidiary, along with a sister company in Uganda, Nyota Wood Industries, is in collusion with the Ministry of Water, Land and Forests of Uganda in establishing a scheme to facilitate the certification of timber coming from the Democratic Republic of the Congo.

There are a number of matters here. First, DGLI is not a subsidiary of Dara Forêt. They are both subsidiaries of the Dara Group. Mr. Kotiram is managing director of both, and holds the controlling interest in both companies, either personally, or by his interest in yet another company, Royal Star Holdings, which while registered in Uganda, is a wholly Thai owned Company. Since the shareholding in Nyota Wood is much the same, presumably it falls under the same umbrella. This is the evidence of Mr. Kotiram, and probably in practice it is true: but probably also these are not in law subsidiaries of Dara Group, (a company registered in the Virgin Islands) since that company does not appear to hold any interest in any of the companies.

Then it can be shown that there was no collusion between Nyota Wood and the Ministry of Water, Land and Forests of Uganda, because one application which was made to the Ministry, which, if the Panel is right, would have been essential to the alleged conspiracy, was refused by the Ministry.

In May 2000, DGLI signed a contract for forest stewardship certification with SmartWood and the Rogue Institute for Ecology and Economy in Oregon, United States of America.

This is not true. Smartwood is the certifying Agency: the Rogue Institute for Ecology and Economy was an agency whom Mr. Kotiram contracted to advise him on SmartWood's requirements for certification. Thereafter Dara contacted another Company, UNIQUE, Wegenhäuser & Partner, who later gave a presentation to the New UN Panel. UNIQUE were advising Dara on the way to go about certification of their concessions in Democratic Republic of Congo and in Uganda.

On 21 March 2000, the Director of the DARA group, Prossy Balaba, sent a letter to the Commissioner asking him to allow an official of SmartWood to visit certain forests, such as Budongo and Bugoma; he was due to visit the region in mid-April.

Prossy Balaba was not "the director of the Dara Group". She was a director and minority shareholder of the Ugandan Company referred to above as DGLI. In that regard it will be noted that

Mr. Kotiram set up his companies with himself in control, supported by the participation of local directors and shareholders. This is quite normal, and indeed required in some countries. In any event, for a Thai National whose languages are not that good, it is certainly advisable.

It is true that the request above was made : this Commission has a copy of the letter.

The visit was meant to deceive the official by presenting those forests as the ones for which certification was sought and to convince SmartWood to work for the certification of their timber.

The evidence of Mr. Kotiram, and of the Forestry Commissioner is quite clear and consistent. DGLI had applied and obtained an investment licence for a factory to process finished and semi-finished timber in Kampala. The specifications for the factory were that it would require an enormous amount of timber, far more than it turned out that Uganda could supply once investigations were made. It was therefore necessary for DGLI to turn to Dara Forêt in the Democratic Republic of Congo for additional supplies. But Mr. Kotiram was advised that, in addition to certification of the timber from Uganda, he would have to show that timber from the Congo was also certified if it was to be processed in the factory, and sold as certified produce. This he was told would be a requirement of SmartWood, who would be interested not only in the forests, but the whole operation. DGLI therefore needed to start with certification in Uganda at least.

Indeed, when the visit took place, from 14 to 16 April, the DARA group had not even applied for the concession of the Budongo forest (Uganda). It was only on 5 July 2000 that John Kotiram of the DARA group wrote to the Commissioner to request the concession on the Budongo forest.

The visit never took place, because the concessions in Uganda had not been granted by the suggested date. Prossy Balaba and Mr. Kotiram told this Commission that to write this letter so early was a genuine mistake brought on in the belief, based on discussions with the Forestry Commissioner that the concessions were to be granted more quickly than they in fact were.

The idea behind this is to use Budongo forest as a model of forests from which timber is harvested and which comply with the international requirements for certification. in order to certify timber coming from the Democratic Republic of the Congo for which basic elements of certification do not exist. Future plans for beating the international system are already in place. According to internal documents of DGLI, DARA-Forest will import timber from the Democratic Republic of the Congo into Uganda. which will be processed for different types of products in the new plant in Namanve for the sawmilling of hardwood. both imported from the Democratic Republic of the Congo and harvested in Uganda. DGLI partners in this new scheme include DARA Europe GmbH Germany. Shanton President Wood Supply Co. Ltd China. President Wood Supply Co. Ltd Thailand, DARA Tropical Hardwood, Portland, Oregon, United States of America.

The Panel's informant no doubt did not have, as this Commission has, DGLI's application to the District Forestry Officers concerned for concessions in three Ugandan Forests, namely Budongo, Bugoma and Mabira dated 11th October 1999, and therefore have seen conspiracies where no conspiracies exist. Mr. Kotiram has explained to this Commission what he planned to do: there is no way that the conspiracy alleged would have fooled experts from SmartWood, as the capacity of the factory would have been obvious, as would the inability of the Ugandan Forests to supply it. The first question would have been where the balance was to come from. Mr. Kotiram accepts the list of overseas companies with whom his companies trade.

In a letter of 5th July 2000, what is alleged to have been recorded only in internal documents is in fact publicly acknowledged.

The distribution of sales of the company is thought to remain the same, about 30 per cent to the Far East, China, Japan and Singapore, 40 per cent to Europe and 25 per cent to North America. DARA Great Lakes Industries shareholding and management is between Thai and Ugandan nationals, among them John Supit Kotiram and Prance Chanyuttasart of Thailand and Prossy Balaba of Uganda.

These figures are accepted by Mr. Kotiram and Prossy Balaba. Prance Chanyuttasart is his wife, who is now unfortunately and lately deceased. Mr. Kotiram retains firm control of DGLI, and is its managing Director

Some unconfirmed information indicates that members of President Museveni's family are shareholders of DGLI, although more investigation is needed.

This Commission agrees that a great deal more investigation is needed before such an allegation appears in a report to a United Nations body. Our own investigations with the Companies Registry reveals nothing whatever of that nature, and the allegation is denied by Mr. Kotiram and Prossy Balaba, and for himself by His Excellency the President.

The DARA group also established another scheme to carry out fraudulent activities in the Democratic Republic of the Congo. The objects of DGLI range from logging to financial and industrial activities. Because of the confusion created between DARA-Forest, which received a concession from RCD, and DGLI, DARA-Forest has also been dealing in diamonds, gold and coltan. The Panel has received reports from the custom posts of Mpondwe, Kasindi and Bundibugyo of the export from the Democratic Republic of the Congo of minerals such as cassiterite and coltan in trucks. During the Panel's visit to Bunia it was reported that other products were loaded in trucks which are supposed to carry timber only; it is likely that coltan and cassiterite were these products. Moreover, the fraud extends to the forging of documents and declarations "originating" in Kinshasa.

The confusion between Dara Forêt and DGLI, on the basis of the evidence, exists only in the mind of the Panel. These appear to this Commission to be two separate Companies, registered in two separate countries. Mr. Kotiram agrees that Dara Forêt has been exporting coltan for which he has a licence, which he has produced to this Commission . It does not appear to be forged. The mineral has been sent in transit through Uganda. Mr. Kotiram has produced before this Commission Customs documents which have been verified for this Commission by URA.

The Panel is not specific as to the forgery alleged: but this Commission suspect that the problem may arise from the use by rebels of original forms left by the Kinshasa Government before the rebellion. In any event, this Commission would be slow to accuse parties of criminal offences such as fraud and forgery without being able to set out specific details with particulars

The logging rate was alarming around Butembo, Beni, Bega and Mambassa. The RCD-ML administration acknowledged its lack of control over the rate of extraction, the collection of taxes on logging activities and the customs fees at the exit points. On the basis of eyewitness accounts, satellite images, key actors' acknowledgements and the Panel's own investigation, there is sufficient evidence to prove that timber extraction is directly related to the Ugandan presence in Orientale Province. This has reached alarming proportions and Ugandans (civilians, soldiers and companies) are extensively involved in these activities. In May 2000, RCD-ML attributed a concession of 100, 000 hectares to DARA-Forest. Since September 1998, overall DARA-Forest has been exporting approximately 48, 000 m³ of timber per year.

UPDF presence in Orientale Province provided the security and access to overseas markets denied to the Congolese for so long. One would therefore expect to see increased activity in the area, not only by Dara Forêt but by other companies as well.

So far as Dara Forêt is concerned, while Mr. Kotiram agrees the figures quoted, he tells this Commission that in his concession he has not cut even a single tree, and he has given this Commission good and sufficient reason for this. The source of his timber has been from individuals, in accordance with a practice outlined to this Commission by another witness.

This Commission is extremely concerned at the approach of the Panel to this subject. Nowhere in the whole of this passage is the reliability of sources quoted, but, considering the emphasis put on these alleged events, the Panel must have come to the conclusion that it was safe to rely on its undisclosed and apparently un-evaluated sources. Yet the perception of those sources, and that of the Panel, was quite clearly wrong. A short interview with Mr. Kotiram would have established the truth, and he was never approached according to his evidence.

From the evidence, this Commission has come to the conclusion that the investigation by the Panel of Dara Forêt was fundamentally flawed. What is most unfortunate is that the publication of the report has led to the arrest of 24 Thais working in the Democratic Republic of Congo for Dara Forêt by the Mai-Mai, who publicly attributed the arrest to the UN Panel Report.

19.2 Mining Sector

This Commission is not yet ready to deal with this subject which requires further investigation

19.3 Wildlife.

Paragraph 61 of the Panel Report states that between 1995 and 1999, 30% of elephants were killed in Garamba National Park in areas controlled by Ugandan troops and Sudanese rebels, and that there are similar problems in other parks.

It is also said that RCD-ML temporarily seized about 3 tons of tusks in Isiro. After strong pressure, it is said, from Uganda, the cargo was released and transferred to Kampala.

In Paragraph 62, as an example of soldiers hunting with the consent of their commander, it is alleged that in August 2000, UPDF Col Mugenyi and a crew of his soldiers were discovered with 800 kg of elephant tusks in their car near Garamba Park. The Government of Uganda received detailed

notification of this incident.

20 ALLEGATIONS AGAINST THE GOVERNMENT OF UGANDA

In Paragraph 61, the implication is that RCD-ML seized about 3 tons of tusks from Ugandans who are not named, and that strong pressure was exerted from some unnamed people in Uganda to release these tusks so that they could continue on their journey to an unnamed destination.

With the evidence at hand, it is impossible to investigate this incident, or to attribute it to the State of Uganda. Officers from the Wildlife Authority told this Commission on Oath that they had no information about this alleged incident, and one would have expected them to have been the agency informed.

In Paragraph 62, that the Government of Uganda received detailed notification of the incident, and, by implication, did nothing.

This Commission is again in problems due to the failure of the new Panel to assist. This Commission has no idea who found the Colonel, or where the recovered tusks are. Nor does this Commission know to whom the report to the Government of Uganda was made: an officer from Wildlife Authority appeared before this Commission and told this Commission on oath that he had not received any such report, nor did he know about the recovered tusks. Col Mugenyi (who was not a particularly impressive witness) denied the whole incident on oath, and there was no evidence to the contrary. It is therefore impossible to attribute blame for this alleged incident to the Government of Uganda .

21 ALLEGATIONS AGAINST HIS EXCELLENCY THE PRESIDENT AND HIS FAMILY

The Panel say :

> *Some unconfirmed information indicates that members of President Museveni's family are shareholders of DGLI, although more investigation is needed.*

This Commission agrees that a great deal more investigation is needed before such an allegation appears in a report to a United Nations body. Our own investigations with the Companies Registry reveal nothing whatever of that nature, and the allegation is denied by Mr. Kotiram, Prossy Balaba, Salim Saleh, Jovial Akandawanaho, and, for himself, by His Excellency the President.

22 MONOPOLIES AND PRICE FIXING

In Paragraph 64 of the Panel Report, Ugandan Troops are alleged to have abused commerce and the trade system by forcing unnamed locally owned and foreign owned businesses to close down with a view of gaining control of local commerce. The Panel say that the result was unprecedented control of the economy of the Eastern and North Eastern Democratic Republic of Congo .

As examples of that, the Panel refer to their field trips to Gbadolite and Bunia in the Democratic Republic of Congo where they found consumer goods which emanated from Uganda.

23 ALLEGATIONS AGAINST UGANDA

Uganda is only involved in this paragraph's allegations by implication. However, this Commission has visited the border posts at Kasindi and Ariwara in the Congo, and were particularly interested in the markets over on the Congo side. This Commission agrees that those markets are full of goods imported from Kenya and Uganda, and indeed from even further afield. However, this Commission does not agree with the Panel that this is unprecedented control of the economy, nor that it is attributable to the actions of Ugandan Troops, apart from the provision of overall security.

First, it is suggested that local and foreign companies have been forced out of business due to trade from Uganda. These companies have not been named, and this Commission doubts whether sending merchandise from Uganda, which is not available in the Democratic Republic of Congo would have the effect of forcing a company in the Democratic Republic of Congo to close down.

All this Commission's investigations show that on each side of the borderline there are similar or the same tribes. On each side of the border are close family relationships, and cross border trade is only to be expected. The evidence before this Commission shows quite clearly that cross border trade has been there in one form or another since time immemorial. This Commission was told that trade through the Western side of the Democratic Republic of Congo has never been practical due to the poor infrastructure and the comparative level of economic development of Kenya, Uganda, Rwanda

and Burundi as against the Democratic Republic of Congo, and that the obvious markets for Eastern Democratic Republic of Congo dwellers has always been Uganda, Rwanda and Burundi, due to proximity and infrastructure.

Certainly Congolese goods can be found in quantity on the Ugandan side: this Commission has seen that to be true. If the Panel's theory is right, then it is surprising that the Panel did not find significant trade in Kisangani in Ugandan Goods, due to UPDF occupation there.

Further, the cross border markets are not some hole in the corner affair. There are market days arranged by agreement from both sides of the border, and proper arrangements in the market places : the best market this Commission saw was in Ariwari which was fully stocked with an array of goods for local purchase. In Mpondwe and Kasindi there were representatives on both sides for Chamber of Commerce, and proper arrangements for resolution of trade disputes had been put in place. Every sign that this Commission saw was the OFIDA and Ugandan Customs were operative and visibly present.

The other level of trade involves those who fly goods from Entebbe to places in the Democratic Republic of Congo, and back from the Democratic Republic of Congo, and also those (like Dara Forêt) who trade within the Democratic Republic of Congo without using the markets, but using lorries.

It is clear that this was happening, and on a major scale. This Commission has dealt with the legality of such trade at Paragraph .1 of 10/.2 above and has required manifests and import documents from some of the airlines and companies involved, and attached to almost every transaction are papers from the Congo showing payment of the relevant taxes. In the case of Dara Forêt, this Commission has details of every cross border transaction the company engaged in, and in each case, again, there is evidence that taxes were paid.

This Commission wonders therefore whether the statement attributed to RCD-ML about non-payment of taxes is correct. There is the possibility which Ugandan traders have raised before this Commission, that there was an unusual arrangement which rebel factions used to raise money quickly. As this Commission understands it, and there are documents in support, traders used to pay a sum to a particular rebel faction in advance of importing goods, and were given a time within which

to complete the import. The race then began to get goods through the border before the expiry of the time limit, which might, for example, be three months. This practice has been confirmed in the affidavits of rebel leaders. Sometimes this worked, but on other occasions differences would arise within the rebel organisations which resulted in the promise to allow import against the prepayment not being honoured.

In Paragraph 68 of the Panel Report, it is suggested that part of the taxes collected by RCD-ML and MLC were sent to Kampala, and individual colonels, who are not named, would claim direct payment from RCD-ML. There is a similar allegation in Paragraph 71 relating to Adele Lotsove. This Commission have dealt with this in Paragraph 18 above

As to the allegation in relation to individual colonels, who are not named, this is incapable of investigation, or of attribution to the State of Uganda.

24 CURRENT STRUCTURES OF ILLEGAL EXPLOITATION

24.1 *Administrative Structures.*

This Commission is not yet ready to deal with this subject, which requires further investigation

24.2 MODES OF TRANSPORTATION

In Paragraph 72 and 73 with 74 of the Panel Report, the Panel criticise the airlines, including the Ministry of Defence, who operated from the Military Airport at Entebbe on the basis that illegal activities, that is transport of products and arms into the Democratic Republic of Congo, and vast quantities of agricultural products and minerals out to Kampala, have benefited from the increase in airline traffic, and in Paragraph 73 that existing airlines are put out of business.

25 ALLEGATIONS AGAINST UGANDA

What is criticised by the UN Panel Report here is the conducting of illegal activities. While this Commission would leave open the question of the UPDF being involved in such activities, as under "Illegality" at 10 above, this Commission cannot see that ordinary trade can be said to be an illegal activity, and this strikes at the whole basis of these paragraphs. For this reason, this Commission cannot see any basis for the criticism of Sabena contained in Paragraph 76, particularly as the evidence is that Air France has taken over the market Sabena has voluntarily left.

This amounts to a criticism of the Ministry of Defence who are credited with using aircraft leased by the UPDF for commercial and non-military functions. This Commission has already dealt with the mis-perception which this involves under "Background and Pre-existing structures" at 12 above . There clearly were two operations at the military airport, military and civilian, and the major operation was civilian.

It is odd that the Panel starts Paragraph 72 by saying that prior to the second war the major forms of transport were by road and by smuggling across the lakes: and thereafter in Paragraph 73, allege that the new means of transport by air put existing air operators out of business. The argument does not seem to be consistent. No doubt in any business opportunity, it is open to any company to develop where there is an opportunity to do so. This Commission cannot see how Uganda as a State can be blamed if Congolese Airlines failed to react to the changing circumstances.

It is alleged that the airlines involved are owned or controlled by "relatives and friends of generals colonels and Presidents". This Commission has on every opportunity to do so, investigated connections with such people. Leaving aside Air Alexander and Take Air for the moment, there is nothing in this allegation. Air Navette which is specifically mentioned is owned by Shiraz Hudani, and the other directors and shareholders are Mrs. Hamida Hudani, and one Abu Mukasa, according to Mr. Hudani's evidence. Modeste Makabuza who is mentioned in Paragraph 75 as a major shareholder is not and never has been a shareholder of Air Navette.

Mr. Hudani specifically denied having any connection with Salim Saleh or any of his companies. He admits however dealing with Jean Pierre Bemba commercially.

25.1 PRIVATE COMPANIES

In Paragraph 85 The involvement of Uganda was treated differently from Rwanda. Effectively the Uganda Government was acquitted of the charge of Systemic and Systematic exploitation by government, and the blame was put on to individuals, mainly top Army Commanders. This is said to be known by the political establishment in Kampala.

26 ALLEGATIONS AGAINST UGANDA

There are two bases upon which the Government of Uganda could be said to be involved. First that

the amount of trade, especially in items where statistics are kept, signalled what was going on in the Democratic Republic of Congo . Second, that there is a specific allegation that the political establishment knew.

There are only very few examples given in the Panel Report where knowledge can be imputed to the Government of Uganda as such, and in each case this Commission does not have sufficient details to be able to investigate, or to attribute knowledge to the Government of Uganda

As to whether top army commanders are the main illegal exploiters of the Democratic Republic of Congo, this Commission runs into a problem. This being an interim report, at a time when this Commission has yet to complete the investigation into UPDF involvement, this Commission is not in a position to come to a conclusion on this point. However, looking at the CAA statistics and the relationship between flights of the Ministry of Defence airplanes and private airplanes, and the manifests available to this Commission, this Commission would think that, if the Ministry of Defence airplanes were being used for transport by senior officers, then it would not have been for the majority of the resources alleged to have been exploited. Further most of the resources flown or driven out of the Democratic Republic of Congo appear to have transited Uganda, rather than to have been exported to Uganda: and in such case, this Commission cannot see that a message would necessarily be transmitted to the Government of Uganda .

26.1 Individual Actors

There are allegations against Salim Saleh, Jovial Akandwanaho, and General Kazini in the Panel Report. This Commission is not yet ready to report on these matters which require further investigation.

27 ECONOMIC DATA : CONFIRMATION OF THE ILLEGAL EXPLOITATION OF THE NATURAL RESOURCES OF THE DEMOCRATIC REPUBLIC OF CONGO

In Paragraphs 94 to 108 economic data is set out in the report.

28 ALLEGATIONS AGAINST UGANDA

The Conclusion the Panel attempts to draw from the data is that other allegations made elsewhere in the report are confirmed by this data.

This Commission has called evidence to evaluate this data and is still in the process of analysing the

data, and it is unable to report on it at this time.

29 LINKS BETWEEN THE EXPLOITATION OF NATURAL RESOURCES AND THE CONTINUATION OF THE CONFLICT.

29.1 BUDGETS COMPARED TO MILITARY EXPENDITURE.

In paragraph 115 of the Panel Report the Uganda budget is set out, with one error by which it is assumed that the military budget pays for the pension of retired soldiers. It has been explained to this Commission, as it would have been to the Panel had they asked, that the budget which they quote covers programme 2 (Land Forces) and programme 3 (Air Forces) only. There is an additional programme 1 which provides for Headquarters, out of which pensions are paid.

In paragraphs 116 and 117 calculations are made, based on various assumptions and directed to show that the budget was overspent by about $16 million. Particularly the calculation relating to the cost of air transport is based upon fantastic and unrealistic figures. The correct figures could have been obtained by the Panel from Ministry of Defence.

Life has been made rather more simple for this Commission . This Commission have not had to make any assumptions or do any calculations, because the actual figures have been availed to this Commission . Overexpenditures during the years 1998 to 2001 were:

98/99 47 billion Ushs

99/00 6 billion Ushs

00/01 14 billion Ushs

Evidence before this Commission was that these overexpenditures were necessary for various reasons, not all of which related to Operation Safe Haven: they were covered by supplementary budgets, and the money provided by Ministry of Defence from funds obtained from Ministry of Finance.

Therefore, in the case of Uganda, the link between exploitation of natural resources of the Democratic Republic of Congo and the continuation of the conflict, based upon the suggestion that

such exploitation was swelling the funds of Uganda's treasury in order to pay for the war is tenuous, to say the least.

Indeed in paragraph 135 of the report, the Panel say:

> *"Uganda unlike Rwanda did not set up an extrabudgetary system to finance its presence in the Democratic Republic of the Congo. The regular defence budget is used and broadly the deficit is handled by the treasury. "*

This is followed by a complicated computation relating to what the Panel call the "re-exportation economy" . This Commission shall consider this in due course, but here only says that the Panel neither say, nor supply evidence that the Government of Uganda was aware of, or encouraged the tricks referred to in the Panel's exposition of the "re-exportation economy". This Commission has no evidence leading to that conclusion.

29.2 FINANCING THE WAR

In Paragraphs 136 – 142 the Panel attempt to make a case for saying that Uganda was able to pay for the war out of what they call a "re-exportation economy". They summarise the case in the following way:-

> *"142. The Ugandan situation can be summarized as follows: the re-exportation economy has helped increase tax revenues, allowing the treasury to have more cash. Businesses related to the conflict and managed by Ugandans have contributed to an extent to generate activities in the economy in a sector such as mining (gold and diamonds). The growth in these sectors has had a trickle-down effect on the economy and permitted Uganda to improve its GDP in 1998 and maintain it somewhat in 1999. The improvement in GDP has permitted, according to Ugandan officials, an increase in absolute terms of the military budget while keeping the level of the military budget at the equal 2 per cent of GDP. The apparent strength of the Ugandan economy has given more confidence to investors and bilateral and multilateral donors who, by maintaining their level of cooperation and assistance to Uganda, gave the Government room to spend more on security matters while other sectors, such as education, health and governance, are being taken care of by the bilateral and multilateral aid."*

Specifically in Paragraph 136/7, the Panel explain the re-exportation economy to imply that natural resources imported from the Democratic Republic of Congo are re-packaged or sealed as Ugandan Natural resources or products and re-exported. They say that that is the case for gold, diamonds coltan and coffee exported by Uganda. Examples given of the impact of the re-exportation economy

on the financing of the war are:-

- Increase of income of businessmen.
- Illegal exploitation of gold improving balance of payments, leading to improving donor confidence in the economy
- Theoretically leading to higher tax collection.

In Paragraph 139, examples are given of road transit of goods through Uganda. This example is irrelevant, because transit goods do not pay duty or taxes in Uganda.

As to the question of collection of taxes in the Congo, that is a matter for the Congolese authorities, and as this Commission has examined elsewhere at Paragraph 18 above, the allegation that taxes were not paid is doubtful. Then there appears to be a suggestion that if customs duties were to have been paid on items in transit, then that would bring in $5 million per month: but in the context of the subject being discussed, that $5 million would neither be income to Uganda from transit goods, nor income to the Democratic Republic of Congo, as customs duties are not payable in the Democratic Republic of Congo for export or transit.

In the affidavit of Ateenyi Tibasiima, he doubts that the figure of $5 million is realistic in any event.

In Paragraph 140 the Panel suggest that Uganda was financing the war by buying military supplies, specifically petrol, on credit.

It seems to this Commission that these are normal commercial transactions, and are matters between, for instance, the petrol companies and Government. This Commission have no doubt that if the credit extended gets too great, the petrol companies would neither extend further credit nor be able to.

In Paragraph 141, the Panel talk of official bonuses. This Commission has the clearest evidence that no official bonuses were paid to soldiers in the Democratic Republic of Congo . There was a payment in lieu of rations to enable soldiers to buy food, which was cheaper for the UPDF than flying food over from Uganda.

If individual soldiers were lining their pockets, with or without the approval of their commanders,

this cannot be connected to the alleged re-exportation economy: and this is an inappropriate place to consider this matter.

To assist the verbatim evidence is set out :-

> *"**Justin Zake:** (Justin Zake is a Deputy Commissioner General with Uganda Revenue Authority) Yeah. I saw in the report $5 million, re-exportation went to the treasury and my reaction was to laugh because if it was re-exportation, and re-exportation does not benefit the Government of Uganda, unless the company doing the re-export is resident and registered in Uganda. In other words, we would not go for income taxes from them because these are transit items, I mean, from one place passing through Uganda, so that would not benefit the Government of Uganda. And I beg your indulgence my Lords, I talked about contribution of the top 200 taxpayers and as I said the top 20 contribute about 50%. Now any of these companies that were mentioned in the report are not in the top 20 and 50% of about a trillion shillings, and that is a lot of trillions. $5 million, and I think that is the captured value, the more captured value, but not tax out of that value, and not a tariff attached on a particular item off what they thought maybe ends up in Uganda. So I would like to tender as well the top taxpayers in Uganda, these are 200 for both 1997-1998 and 1999-2000 just to give you a feel of what it is. So the issue of dramatic revenue arising out of Democratic Republic of Congo and significant contributions to the treasury, the data that I have doesn't bear that out.*
>
> ***Justice J.P. Berko:** Actually the UN were not concerned with the legitimate trading between the two countries and that is what would be reflected in your documents. But they were really worried about the illegal trade between the two countries.*
>
> ***Justin Zake:** My Lord I do understand that.*
>
> ***Justice J.P. Berko:** And that one would not reflect, in treasury accounts.*
>
> ***Justin Zake:** It wouldn't reflect in treasury accounts, not as far as we are capturing. Maybe after having read the report and they were talking of re-exportation, there are no taxes on exports, so somebody resident in Uganda, and registered in Uganda can take out whatever they want, there will be no tax on the export, however, he will be liable to the profit tax if he makes profits. If a company is non-resident in Uganda and consigns directly from the Democratic Republic of Congo to wherever and it is just transiting Uganda I cannot tax them because they are not resident in Uganda. Yes, the Income Tax Act 1997 talks about the concept of global income, but that is for a company that is resident in Uganda and it is earning from global sources, that is taxable. And of course where there is a double taxation agreement there is a set off, so that is my submission.".*

And

Micheal Atingi-Ego: *(Micheal Atingi-Ego is Acting Director of Research at Bank of Uganda) My Lords, I would not want to entirely believe that re-exports have benefited the Ugandan economy as such, if there were benefits to Uganda economy they should be clearly spelt out. First of all re-exports are not taxed just like any exports are not taxed so I do not know how benefits would have come in there and if there are re-exports that are going out through Uganda the beneficiaries of these might be the non residents may be the foreigners given the good infrastructure that they are using for re-exporting the receipts they get from those re-exports go direct to the economy, so how will it benefit Uganda?*

Assistant Lead Counsel: *So you are saying that any re-exportation would not benefit?*

Micheal Atingi-Ego: *I cannot say that there is no benefit at all, for example, if you have trucks coming from Rwanda or Sudan or Congo going through Uganda may be re-exporting, there are indirect effects that you have e.g. business might boom for small owners of restaurants, lodges, eating places etc. It can get an indirect benefit just like you have Ugandan traders who are bringing oil from Mombasa, we buy this Commission's oil from there and it is a re-export of Kenya and it comes to Uganda and as the truck drivers go to Kenya to pick the oil they may stop in Kisumu for a night, spend some money there so the owners of such business benefit If that is the kind of benefit that you are talking about*

Assistant Lead Counsel: *No I am talking in the terms of benefit to the treasury in terms of taxes or custom duties. Please look at paragraph 138 where they make that allegation that there were trucks carrying timber, coffee, minerals etc*

Micheal Atingi-Ego: *Paragraph 138, the very first sentence reads:*

"Secondly, illegal exploitation of gold in the Democratic Republic of Congo brought a significant improvement in the balance of payments of Uganda

That statement is wrong because this Commission's current account balance has been deteriorating so much, this Commission's exports are far less than this Commission's imports so I do not know how it is improving and the improvement in the overall balance of payment is largely as a result of donor in flows coming to this country not as a result of exports because these are far less compared to this Commission's imports even the tables I have here show that the current account has been deteriorating for a long time and this is being financed by donors to the extent that exports, leave alone the re-exports are not taxed I do not see how the treasury benefits from this

Assistant Lead Counsel: *Because you are saying that customs wouldn't be paid on transit and re-exports. Customs duties wouldn't be paid on re-exports so the treasury wouldn't benefit?*

Micheal Atingi-Ego: *No they do not tax exports. any exports in Uganda are not taxed*

Assistant Lead Counsel: *The statement that the Ugandan treasury got at least 5 million dollars every month ……..*

Micheal Atingi-Ego: *To the best of my knowledge that is not the case because exports are not taxed so how would the treasury benefit*

Assistant Lead Counsel: *I want to make this final question. is there a significant relationship between the policy of liberalization and the volume of trade that Uganda has enjoyed in these years?*

Micheal Atingi-Ego: *My Lord there is a strong significant relationship between liberal policies pursued by the government of Uganda and the volume of trade in that during the period of controls farmers were paid farm gate prices for the products an amount which was not competitive to make them recover the costs of production so what happened was that in most cases the cost of producing an item that is sold to a state owned enterprise e.g. Produce Marketing Board, Coffee Marketing Board, the farmers could not recover some of the costs they were incurring so as a result they abandoned growing of these cash crops and resorted to subsistence. Evidence shows that non monetary economy picked up at or during the time of controls. however. when the government of Uganda liberalized its economic environment the incentives for farmers produce picked up so much because a farmer was now free to sell his/her products at a prize that would cover the production costs. Ever since the government of Uganda began liberalizing production has picked up and then we also liberalized both the current and capital accounts and so the border trade has also picked up, e.g. the trade between Uganda and Kenya, Uganda and Rwanda and the trade between Uganda and the Democratic Republic of Congo particularly when West Nile got some degree of peace as a result that there are some items which are produced in Uganda that may not be produced in other countries. We are well known for supplying food to Kenya and in return agents get manufactured goods particularly when we had this Commission's manufacturing sector here not working. It was a normal border trade but what is happening is that when we liberalized production picked up and therefore the volume of trade has picked up"*

We think therefore that the attempt of the Panel to show that Uganda was financing the war in the Democratic Republic of the Congo through the re-exportation economy fails.

In Paragraph 180 the Panel raise the question of the Hema-Lendu and Nia-Nia conflicts: elsewhere the question of the Kisangani confrontations is also raised. And it is suggested that these conflicts were strategies used to sustain the vicious circle of war and exploitation. We do not feel at the

moment that this Commission's inquiries have gone far enough to come to a conclusion on these issues, and are therefore not prepared to report at this time.

31 FACILITATORS OR PASSIVE ACCOMPLICES

31.1 PRESIDENT MUSEVENI

The Panel in Paragraph 201 accuse President Yoweri Museveni of complicity in the exploitation of the natural resources of the Democratic Republic of Congo and the continuation of the war in that country on three grounds, namely his alleged policy towards the rebel movements, his attitude towards the Uganda army and the protection provided to illegal activities and their perpetrators. On his alleged policy towards the rebel movements, The Panel alleged in Paragraph 202 that President Museveni has shaped the rebellion in the area controlled by Uganda according to his own political philosophy and agenda of a more centralised authority and preparing to intervene only when major problems arise, even though he has a good knowledge of the situation on the ground.

We think that matters pertaining to the President's political philosophy and agenda are beyond this Commission's terms of reference and not suitable for the enquiries this Commission has been asked to conduct. We hasten however to point out that President Museveni has publicly declared on many occasions that the internal administration of the Democratic Republic of Congo is for Congolese themselves, so long as the security concerns of Uganda are addressed.

It was for this reason the Gen Kazini was reprimanded for meddling in the local administration in the Democratic Republic of Congo .

President Museveni has been accused in para 203 of not taking action against Nyamwesi and Tibasima for alleged embezzlements of $10 million and $3 million respectively. We think the accusation is misconceived as the President of Uganda has no jurisdiction over Congolese Nationals and rebels leaders for that matter.

In the same paragraph 203 President Museveni was accused for not taking action about an alleged collusion between Trinity Group and Tibasima and its impact on collection of customs duties. Here again this Commission wishes to point out that the Panel was ill advised to accuse President

Museveni as he has no jurisdiction over the actors alleged in the collusion.

President Museveni has again been accused in Para 205 for having allowed members of his family namely Gen Salim Saleh and his wife who are alleged to be shareholders in Victoria Group and Trinity to carry on business activities in the occupied zones of the Republic of Congo undisturbed.

We have evidence on oath that Victoria Group does not exist. Therefore Gen Salim Saleh and his wife could not have been shareholders in that Company. We also have evidence on oath that Trinity is a fictitious company established by the rebels in the Eastern the Democratic Republic of Congo to generate funds to organise their campaign against the Kinshasa Government. General Salim Saleh and his wife have said that they have no interest in that company.

Consequently it was wrong for the Panel to accuse President Museveni for allowing the two companies to operate in the Democratic Republic of Congo undisturbed.

Therefore the Panels conclusion in Para 206 is misconceived and unwarranted.

ANNEX I EXHIBITS

THE REPUBLIC OF UGANDA

THE COMMISSIONS OF INQUIRY ACT, CAP. 56

THE COMMISSION OF INQUIRY (ALLEGATIONS INTO ILLEGAL EXPLOITATION OF NATURAL RESOURCES AND OTHER FORMS OF WEALTH IN THE DEMOCRATIC REPUBLIC OF CONGO), 2001

INDEX OF EXHIBITS

NO.	MARKED AS	SUBJECT	TENDERED BY
1.	BKB/I/1	Minutes of Good Neighbourliness Meeting between Uganda/Zaire officials held at Rukungiri District H/Q on 9-10/6/1998.	CW/01/01 Bernadette Kyomugisha Bigirwa
2.	BKB1/2	Minutes of Border Meeting held at Kasindi on 14/5/1998.	
3.	SKB/I/3	Protocol between DRC/Uganda on Security along common border in April 1998.	CW/01/02Steven B. Kavuma

4.	SBK/I/4	Radio Message by HE President to Chief of Staff banning trading in DRC by UPDF Officers/Men on 15/12/1998.	"
5.	SBK/I/5	Press report of interview with Mr. Steven Kavuma, the then Minister of State for Defence: *New Vision*, 24/11/1998.	"
6.	SBK/I/6	Press reports on refutation by the army of Congo claims of UPDF forces' presence in the DRC territory: *New Vision*, 12 Aug. 1998.	"
7.	SBK/I/7	Press reports of continued plane flights from DRC into Old airport, Entebbe in spite of CAA directive: *New Vision*, 14/08/1999.	"
8.	SBK/I/8	Agreement for a Ceasefire in DRC (Lusaka Peace Agreement), 1999.	"
9.	JK/I/9	Photocopy of document from one Bimbabo, a FAC officer, to an ADF officer (captured doc. on 15/2/98).	CW/01/03 Brig. James Kazini
10.	JK/I/10	Letter from Intelligence Officer, Capt. Kanuke to the Chief of Staff on allegations against Col. Karim (interference with customs) dated 14/3/1999.	"
11.	JK/I/11	Letter of appointment by Brig. Kazini of Ms. Adele Lontove *as a provisional* administrator of Ituri province in DRC dated 18/6/99.	"
12.	KBC/I/12	Brief to H.E President Y.K. Museveni by Uganda's Ambassador to DRC (Dr. Kamanda Bataringaya Cos) on the insurgency in Rwenzori Mountains along Common Border.	CW/01/04 Dr. Kamanda Bataringaya Cos
13.	KBC/I/13	Press Article Titled, " Uganda is in Congo Legally", Sunday Vision, 13/09/1998, pg.9.	"

14.	KBC/I/14	Joint Communique Between DRC and Uganda of 1/6/1999.	-
15.	BM/I/15	Ministry of Defence Approved Estimates of Revenue and expenditure (Recurent and Development) 1998/99.	CW/01/05 Ben Mbonye
16	BM/I/16	Ministry of Defence Proposed Estimates 1998/99, Financial Analysis of Programme 02 and 03 as at 30/06/99.	-
17	BM/I/17	Ministry of Defence Approved estimates of revenue and expenditure (Recurent and Development) 1999/2000.	-
18	BM/I/18	Ministry of Defence Proposed Estimates 1999/2000, Financial Analysis of Programme 02 and 03 as at 30/06/2000.	-
19	BM/I/19	Ministry of Defence Draft Estimates of Revenue and expenditure (Recurrent and development) 2000/01.	-
20	RO/I/20	Peace (SIRTE) Agreement Between Uganda, Eritrea, Chad and DRC (18/04/1999).	CW/01/06 Ralph Ochan
21	RO/I/21	UN Security Council Resolution 1258 (1999) dated 6 August 1999.	-
22	RO/I/22	UN Security Council Resolution 1291 (2000) dated 24 February 2000.	-
23	RO/I/23	UN Security Council Resolution 1304 (2000) dated 16 June 2000.	-
24	RO/I/24	UN Security Council Resolution 1323 (2000) dated 13 October 2000.	-
25	RO/I/25	UN Security Council Resolution 1332 (2000) dated 14 December 2000.	-
26	RO/I/26	UN Security Council Resolution 1341 (2001) dated 22 February 2001.	-

27	RO/I/27	Letter by Uganda's Charge d' Affaires (Fred Beyendeza), Permanent UN Mission, New York, 16/08/1999. - to PS, Min. of Foreign affairs, Uganda. Attached:- Statement to the UN by DRC Permanent Rep. to UN and the Rep.'s letter to UN eurity Council.	-
28	RO/I/28	Letter dated 4 may 2001 by UN Sec. Gen. Kofi A. Annan to H.E., Y.K.Museveni, appealing to Uganda not to withdraw from the Lusaka Peace Process.	-
29	RO/I/29	Govt. Response to UN Panel Report	-
30	KT/J/30	Certificate of incorporation, Memorandum and Articles of Association for TRINITY (U) LIMITED.	CW/02/01 Ketmh Tukumtire
31	KT/J/31	Certificate of Incorporation, Memorandum and Articles of Association for DARA GREAT LAKES (INDUSTRIES) LIMITED.	-
32	KT/J/32	Certificate of Incorporation, Memorandum and Articles of Association for NYOTA WOOD INDUSTRIES (U) LIMITED.	-
33	KT/J/33	Certificate of Incorporation, Memorandum and Articles of Association for ROYAL STAR HOLDING LIMITED.	-
34	PB/J/34	Application for CERTIFICAION authority in respect of Budongo and Bugoma forests, dated 21st march 2000 by Prossy Balaba of DARA GREAT LAKES (INDUSTRIES) LTD., to the Commissioner, Forestry.	CW/02/03 Prossy Balaba

35	PB/2/35	Application for CONCESSION in respect of Budongo, Bugoma and Mabira forests, dated 21st march 2000 by Prossy Balaba of DARA GREAT LAKES (INDUSTRIES) LTD., to the Commissioner, Forestry.	"
36	PB/2/36	3 PROVISIONAL LICENCES No 149, 150 & 351 all dated 18/09/2000 for DARA GREAT LAKES (INDUSTRIES) LTD., to Harvest and Process Forestry Produce in Budongo, Bugoma and Mabira Forests.	"
37	DNB/2/36A	3 LICENCES No 149, 150 & 351 all dated 18/09/2000 for DARA GREAT LAKES (INDUSTRIES) LTD., to Take Forest Produce from Budongo, Bugoma and Mabira Forests.	CW/02/04 Deogratius Nkeija Byarugaba
38	KT/2/37	Certificate of Incorporation, Memorandum and Articles of Association for M/S DARA EXPRESS (UGANDA) LIMITED.	CW/02/01 Ketrah Tukamtire
39	KT/2/38	Certificate of Incorporation, Memorandum and Articles of Association for TRINITY INTERNATIONAL LIMITED.	"
40	KT/2/39	Letter dated March 27, 1996 by MAYANJA - NKANGI, EDWARD ELUE & CO, to the Registrar of Companies, inquiring whether the name TRINITY HOLDINGS (UGANDA) LIMITED, was available for registation as a Company. Plus attachments including the Certificate of Incorporation.	"

41	KT/2/40	Certificate of Incorporation, Memorandum and Articles of Association for TRINITY 2000 LIMITED.	"
42	PB/2/41	Application for a Permit to Harvest Hard Wood(Cynometra Alexandria, Celtis and Pirinari) from Budongo forest, dated 11th October 1999, by Prossy Balaba of DARA GREAT LAKES (INDUSTRIES) LTD., to the Commissioner, Forestry.	CW/82/83 Prossy Balaba
43	PB/2/42	Letter dated July 5, 2000 by John Kottman of DARA GREAT LAKES (INDUSTRIES) LTD., to the Commissioner, Forestry as a follow up of the subject in PB/2/41 above.	"
44	DNB/2/43	SI 56/1987 The External Trade (Export Restricted Goods) Order, 1987. Prohibits the Export of TIMBER.	CW/82/86 Dongratius Nkaija Byarugaba
45	DNB/2/44	Letter dated 25th July 2000 by Jacques Chan of NYOTA WOOD INDUSTRIES (U) LTD , to the Commissioner of Forestry, seeking clearance for transit timber traded by their sister company, M/S DARA FOREST of Beni, Congo.	"
46	GMD/1/45	(UPDF) 2000/2001 Proposed Budget Financial Analysis of Programme 02 and 03 as at 30/06/2001.	CW/CW/91/87 Gabindade Musoke David
47	GDM/1/46	UPDF Salary Payments to units Under operation Safe Haven for:- August - December 1998; January - December 1999; January - December 2000; January - june 2001.	"
48	GDM/1/47	UPDF RCA Payments to Units Under Operation Safe Haven for:- August - December 1998; January - December 1999; July 1999 - June 2000; July 2000 - June 2001.	"

49	GMD/1/48	UPDF Aeroplane Charter Payments for 1998/1999; 1999/2000; 2000/2001.	-
50	GDM/1/49	Agreement for Lease and Charter Services Between the Government of the Republic of Uganda and Uganda Air Cargo Corporation, dated 26th July 2000.	-
51	GDM/1/50	Amendment to and Renewal of the Agreement in GDM/1/49 above.	-
52	JSK/2/51	French Version of Articles and Memorandum of Association for DARA FORET.	CW/02/06 John Supit Kotimos.
53	AM/1/52	Joint Communique of 26/09/1998 Between Uganda and DRC, on Security along Common Border, Police Training and refugees.	CW/09/08 Amama Mbabazi
54	AM/1/53	Agreed Minutes of the Ministerial Meeting on Security and Refugee Matters Between the Uganda and the DRC held in Kampala on April 7, 1998.	-
55	AM/1/54	Statement of 23/09/1999 by Hon. Amama Mbabazi to the 53rd Renamed Session of the UN General Assembly.	-
56	AM/1/55	Statement of 27/10/1998 by Hon. Amama Mbabazi to the Lusaka Ministerial Meeting on the Conflict in DRC.	-
57	AM/1/56	DRAFT SECURITY COUNCIL PRESIDENTIAL STATEMENT dated January 26, 2000 by Hon. Amama Mbabazi to UN Security Council President.	-
58	AM/1/56 (b)	Uganda's Reaction (Hon. Amama Mbabazi) of 30 January, 2000 to 1/27 SECURITY COUNCIL DRAFT RESOLUTION ON DRC.	-

59	AM/I/57	GoU Response to UN Panel Report dated 3rd April 2001.	-
60	KT/2/58	Memorandum and Articles of Association of VICTORIA BIOTECHNOLOGY LTD.	CW/KI/01 Kenneth Tukamuhirw
61	NM/I/59	1. Photographs Depicting Scenes of and Atrocities by Rebels Fighting Uganda Government. 2. Statements made to CMI by Lt. Soko Lutaya, Lt. Col. Fenekan Mug[illegible]yi, Lt. Col. John Wanwa and Col. Sula Samakula following allegations against UPDF and individual Officers, contained in the UN Panel report.	CW/KI/T1 Lt. Col. Noble Mayombo
62	JN/2/60	Volume of Timber Production in Uganda in Cubic Metres From Mid 1997 to 2000 as Per Forestry Department Computerized Data Bank.	CW/KI/07 James Ndimukuiga
63	JN/2/61	Two Copies of Letters dated 11th October 1999 from DARA GREAT LAKES (INDUSTRIES) LTD by Penny Balaba, being Applications for Permits to Harvest timber from Bugoma and Mabira Forests Respectively.	-
64	JN/2/62	Letter dated 18th September 2000 from Ag. Commissioner of Forestry to M/S NYOTA WOOD INDUSTRIES (U) LTD., being a reply to theirs, seeking a permit or special clearance for their transit timber from DRC.	-
65	WLA/I/63	Contract dated 19th October 1998Between GoU and KNIGHT AVIATION.	CW/KI/L2 William Luwemba Agwali
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THE REPUBLIC OF UGANDA

THE COMMISSIONS OF INQUIRY ACT, CAP. 56

THE COMMISSION OF INQUIRY (ALLEGATIONS INTO ILLEGAL EXPLOITATION OF NATURAL RESOURCES AND OTHER FORMS OF WEALTH IN THE DEMOCRATIC REPUBLIC OF CONGO), 2001

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BACKGROUND TO UGANDA INVOLVEMENT IN CONGO

NO.	FULL NAMES	REFERRED AS
01	131.1.1..1 Bernadette Kyomugisha Bigirwa	CW/01/01
02	Steven B. Kavuma	CW/01/02
03	Brig. James Kazini	CW/01/03
04	Hon. Dr. Kamanda Bataringaya Cos	CW/01/04
05	Ben Mbonye	CW/01/05
06	Maj. Gen. Katumba Wamala	CW/01/06
07	Ralph Ochan	CW/01/07

08	Gabindade Musoke David	CW/01/08
09	Hon. Amama Mbabazi	CW/01/09
10	Hon. Maj. Tom Butime	CW/01/10
11	Lt. Col. Noble Mayombo	CW/01/11
12	William Luwemba Apuuli	CW/01/12
13	Maj. Musinguzi Jones Kafiire	CW/01/13
14	Maj. Gen. J. J. Odongo	CW/01/14
15	President Yoweri Kaguta Museveni	CW/01/15
16	Lt. Col. Andrew Lutaaya	CW/01/16
17	Dr. Cripus Kiyonga	CW/01/17

BRIEF 2

Exploitation Allegations Pertaining to Timber – DARA Case and Other Timber Related Allegations

NO.	FULL NAMES	REFERRED AS
01	131.1.1..2 Kenneth Tukuratiire	CW/02/01

02	Joseph Olea	CW/02/02
03	Pross Balaba	CW/02/03
04	Deogratius Nkeija Byarugaba	CW/02/04
05	Allen Kagina	CW/02/05
06	John Supit Kotiram	CW/02/06
07	James Ndimukuluga	CW/02/07
08	Grace Majoro	CW/02/08

BRIEF 2 (A)

TRANSPORT

NO.	FULL NAMES	REFERRED AS
01	131.1.1..3 Lt. David Livingstone Kozurubuga	CW/02A/01
02	Capt. Richard Badogo	CW/02A/02
03	Lt. Col. John Kasaija Araali	CW/02A/03
04	Ambrose Kashaya Akandonda	CW/02A/04
05	Bart Kakooza	CW/02A/05

06	Shiraz hudani	CW/02A/06

BRIEF 3

EXPLOITATION ALLEGATIONS PERTAINING TO MINERALS, DIAMONDS, GOLD, CASSITERITE, OTHER MINERALS AND ECONOMIC DATA

NO.	FULL NAMES	REFERRED AS
01	131.1.1..4 Watuwa Bwobi	CW/03/01
02	Roger Carion	CW/03/02
03	Michael Atingi - Ego	CW/03/03
04	Justin Zake	CW/03/04
05	Kasule Mohamed	CW/03/05
06	Twinomujuni julions	CW/03/06
07	Farouq Kigozi Makubya	CW/03/07
08	Songa Museme	CW/03/08

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NO.	FULL NAMES	REFERRED AS
01	131.1.1..5 Henry Agyenda Ngabirano	CW/04/01
02	Justus Kashagire Tindigarukayo	CW/04/02

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NO.	FULL NAMES	REFERRED AS
01	131.1.1..6 Elizabeth Kuteesa	CW/05/01
02	Lt. Col. Joseph Arocha	CW/05/02
03	Sam Engola	CW/05/03
04	Col. Kahinda Otafiire	CW/05/04
05	Col. Peter Kerim	CW/05/05

BRIEF 7

ALLEGED EXPLOITATION BY INDIVIDUALS AND TOP UPDF OFFICERS

NO.	FULL NAMES	REFERRED AS
01	131.1.1..7 Maj. Gen. Caleb Akandwanaho Salim Saleh	CW/07/01
02	Lt. Muhoozi Keinerugaba	CW/07/02
03	Lt. Col. Fenekasi Mugyenyi	CW/07/03
04	Lt. David Livingstone Okumu	CW/07/04
05	Jovial Akandwanaho	CW/07/05

BRIEF 8

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NO.	FULL NAMES	REFERRED AS
01	131.1.1..8 Tushabe Christopher alias Bene	CW/08/01
02	131.1.1..9 Masereka Ibrahim	CW/08/02
03	Ramadhan Kalibod	CW/08/03
04	Ezekiel Mwehga	CW/08/04
05	James Burolerro	CW/08/05

06	Maisho Fred	CW/08/06
07	Moses Ikagobya	CW/08/07
08	John Masoro	CW/08/08
09	Kasoro Williams	CW/08/09
10	George Ambe william	CW/08/10
11	Milton Rabuka	CW/08/11
12	Edison Adiribo	CW/08/12
13	Alex Angundru	CW/08/13

ANNEX 3 PAPER ON ILLEGALITY

The Concept of 'Illegality' in International Law: Theoretical and Doctrinal Analysis *vis-à-vis* Allegations of *Illegal* Exploitation of Natural Resources and other forms of Wealth in the Democratic Republic of the Congo

I. Introduction.

1.1 The concept of *illegality* in international law has been subject of theoretical analysis and controversy in legal scholarship, international relations as well as doctrinal pronouncements by courts. The earliest post-19th century statement of the concept is traceable to the *Manchuria question* and the *Stimson* doctrine of *non-recognition* of a puppet statal entity created in the aftermath of Japan's invasion of China. The non-recognition policy urged by the then US Secretary of State was premised on the perceived *illegality* of Japan's action as being in violation of the prohibition on the use of force in international relations.[1] Since then the concept of *illegality* and the doctrine of *non-recognition* have come to underpin conduct of states in international law.[2] This has been the case in the respect of the unilateral declaration of independence in Rhodesia; conduct of South Africa after termination of its mandate over South West Africa; creation of *bantustans* in South Africa; Israel-occupied territories in the Middle East; Turkish occupation of Northern Cyprus; and the Iraqi occupation of Kuwait.

1.2. Traditionally, the consequence of an illegality is non-recognition of acts or conduct of the illegal entity or authority with respect to territory. However, this concerns acts or conduct that pertains to a claim or alteration in status of a territory. Thus, for instance, conduct on the part of South Africa that tended to confirm its continued claim to administer South West Africa as a mandatory power after the termination of the mandate by the UN Security Council was regarded as invalid.[3] Or for that matter conduct on part of the then *apartheid* South Africa that confirmed the segregation policy in creation of *bantustans* as *separate statal entities*.[4] Or the case of Israel's policy of settlements which was seen as intended to alter the Arab-character of its occupied territories and give an impression of disguised annexation.[5] Thus if Uganda (and Rwanda) purported to annex the eastern part of the DRC territory, this would in effect amount to an alteration of the status of that part of territory, and would *prima facie* be an illegal act or conduct.[6]

II. The Concept of 'Illegality' and the DRC Expert Panel's Interpretation.

2.1 A significant concern has been the conceptualisation of *illegality* in respect of the 'illegal' exploitation of natural resources and other forms of wealth in the Democratic Republic of Congo (DRC). The Panel of Experts established by the United Nations[7] saw it necessary as a starting point to give a definition or interpretation of *illegality* as a key-concept. The Panel admits that it was the 'most contentious concept in [its] mandate'.[8] Further, it states that: 'almost all actors in the conflict and observers requested a clear definition of illegality'.[9] In the finality, the Panel adopted what it saw as a wish of the Security Council

for a broad interpretation of the concept, and in this regard it understood it to be underpinned by *four* elements (related to the rule of law), viz.: (a) violation of sovereignty; (b) respect of existing regulatory framework for conduct of activities; (c) accepted practices in trade *vis-à-vis* those obtaining in the DRC and (d) violations of international law (including 'soft law').[10]

2.2. In respect of violation of sovereignty, the Panel states:

> The first element is based on the Security Council's understanding of illegality as described in the Panel's mandate. This posits that all activities - extraction, production, commercialization and exports - taking place in the Democratic Republic of the Congo without the consent of the legitimate government are illegal. This interpretation suggested that only non-invited forces and nationals are carrying out illegal activities in the Democratic Republic of the Congo.[11]

This should essentially be the fundamental starting point of determining that a particular act or conduct is an illegality. In this case, the presumption is that the United Nations having condemned the presence (and continued presence) of Uganda (and Rwanda) in DRC territory as a violation of territorial integrity and political independence of the DRC,[12] this *particular* conduct on the part of Uganda is in itself an illegality. This in itself however does not dispose off the question of whether all the activities involving exploitation of resources in the territory of another State are to be considered illegal. This probably explains the Panel's contention that it employs the four elements it identified as a basis of its definition of illegality in a complementary manner.[13] But this in itself has a shortfall in that it presumes in the corollary that activities of the (so-called *legitimate*) Kinshasa regime (and its allies) are legal. This may not necessarily be the case.

2.3. With regards to the second element, the Panel expressed thus:

> ... If authorities exerting effective power and control over their sovereign area recognize or set up a regulatory framework to govern the use or exploitation of resources, this framework should be respected. Failure to do so may lead to the infringement of law and, therefore, activities considered illegal and unlawful. In this case the Panel deems illegality to be the carrying out of an activity in violation of an existing body of regulations.[14]

This is a rather vague recognition that activities in rebel-held areas of the DRC territory *may be* legal if they are carried out in accordance with a regulatory framework. The *authorities* exerting *effective power* in this case must be taken to mean the rebel groups (and their backers). One may assume that this is an implied recognition that in a situation in which the *legitimate government* has lost effective control over part of its territory (to rebels or a foreign occupier), those exercising effective authority must ensure continuity of civil life in its various manifestations. This tends to be in contradiction with the Panel's view in their first element that 'non-invited forces and nationals are carrying out illegal activities in the Democratic Republic of the Congo'.

2.4. It is to be admitted that those in effective control must not allow society to degenerate into lawlessness and anarchy. This is perhaps crucial in the Panel's concerns about an existing regulatory framework for exploitation and trading in natural resources. What exactly the existing regulatory framework for that purpose is or was, either in the DRC generally or the rebel-held parts, is not stated or outlined by the Panel, although this may imply regulations on, for instance, concessions, reforestation, etc. The crucial questions are thus:

(a) who was or were the *authorities* in *effective power*; and

(b) was or has there been in existence a *viable regulatory framework* prior to or after exerting of effective control by such authorities in the DRC?

These concerns were not adequately addressed and one is left to infer from particular incidents in the report. Are the authorities in effective power the rebel groups clothed with administrative authority by the Lusaka agreement of 1999? Further, it is contended that the history of DRC shows harvesting of timber and mining of minerals permitted to individuals outside the realm of state control – is this the regulatory framework to bear in mind?

2.5. The third element identified by the Panel was:

> The discrepancy between *widely* accepted practices in trade and business and the *way* business *is* carried in the Democratic Republic of the Congo ... [T]he Panel considered the use and the abuse of power by some actors fall in the category of illegality. This includes forced monopoly in trading, the unilateral fixing of prices of products by the buyer, the confiscation or looting of products from farmers and the use of military forces in various zones to protect some interests or to create a situation of monopoly.[15]

This element largely ties in with the second. Similarly, inferences can only be read into particular incidents documented in the report. Here, it also begs the question of what is accepted practices of trade and business, given that in the DRC for decades in the Mobutu era, the exploitation of and trading in natural resources might not have followed the so-called 'accepted practices'. In any event, incidents of looting, confiscation, forced monopolies are perhaps better conceptualised in relation to the functioning of the *de facto* authorities.

2.6. The fourth and final element of illegality identified by the Panel is stated as:

> The violation of international law including 'soft law'. The Panel considers that business activities carried out in violation of international law are illegal.[16]

What the international law in question is (including the so-called 'soft law') is not stated or outlined. Incidents such as those alleged to involve exploitation of wildlife (e.g. elephant tusks) in violation of CITES can be considered to be in this category–these acts would *prima facie* be illegal irrespective of whether undertaken by the Kinshasa government or authorities in rebel-held parts if

they were in violation of CITES. Is the certification of timber, for instance, an instance of 'soft law' and would the failure to do so entail an illegality in real terms?

2.7. However, what is perhaps more crucial and was not dealt with by the Panel is the principle in international law on permanent sovereignty of *States* and *peoples* over their natural resources.[17] In this regard, the exploitation of natural resources by either side or all parties to the conflict that would not benefit (or is inimical to the interests of) the Congolese peoples would be in violation of international law and, therefore, inherently *illegal*.

III. Theoretical and Doctrinal Postulations on Illegality – Concept and its Application

3.1 A concept of *illegality* has in application in international law been founded on the desire to proscribe certain conduct on part of States. This is particularly so where the conduct offends the so-called values in the realm of *order public* of the international community, e.g. non-use of force, self-determination, non-discrimination (*apartheid*). Traditionally, theory and doctrine was concerned with the illegality and non-recognition of entities or territorial acquisitions in violation of international law such as Manchuria and the Iraqi occupation of Kuwait respectively. In the past century, theory and doctrine came to embrace *humanistic* elements in situations such as Rhodesia, Namibia, *bantustans*, Israel-occupied territories. The emphasis was placed on the human character of the illegal statal entities or acquisitions in the nature of *peoples* deprived of rights to self-determination or sovereignty over natural resources. The state or territory thus ceased to be an abstraction.

3.2 The very transcendence of abstractions of state or territory and recognition of the 'human element' in those erstwhile abstractions was also to be the premise for exempting certain acts or conduct of the otherwise illegal statal entity or authorities from the realm of *illegality*. Doctrine and state practice has sought to except certain acts or conduct of an other illegal statal entity or authority in effective power if the acts or conduct, while they do not affect the status of territory, are nonetheless beneficial to the social ordering of human existence in that territory. Therefore the illegality would exclude activities that support the *social fabric* and *livelihood* of inhabitants/people in the particular territory.

3.3 Illegality (and non-recognition) would concern with the *external* aspects of territory – and a duty would thus be placed on states to refrain from dealings that otherwise legitimise or entrench an illegality. This has been distinguished from acts or conduct that are beneficial to the *internal* ordering of society. This distinction was made by the International Court of Justice with regards to South West Africa in the wake of termination of South Africa's mandate. The Court observed that the duty imposed was to abstain from *diplomatic*

relations and economic and other forms of relationships or dealings with South Africa in respect of the territory[18] - in effect, relations that would affirm South Africa's continued exercise of mandatory powers over Namibia. The Court nonetheless recognised the fact that the 'injured entity is a people',[19] and that:

... In general, the non-recognition of South Africa's administration of the Territory should not result in depriving the *people* of Namibia of any advantages from international co-operation. In particular while *official* acts performed by the government of South Africa on behalf or concerning Namibia after the termination of the Mandate are *illegal* and *invalid*, this invalidity shall not extend to those acts, such as, for instance, the registration of births and deaths, marriages, the effects of which can be ignored only to the detriment of the *inhabitants of the Territory*.[20]

3.4 Similar positions were taken in respect of the non-recognition of statehood with regards to Rhodesia (1965-1980) and the Bantustans (1970s-1994) where acts and conduct affecting private lives and social ordering of peoples were to be excepted from the realm of illegality.[21] What is admitted is that certain acts and conduct are excepted from illegality *if it ensures survival of inhabitants or peoples in the territory* – whether it is a situation of rebel-controlled areas (e.g. eastern DRC), territory occupied by a foreign power (e.g. Israel-occupied territories in the Middle East and Turkish-occupied Northern Cyprus) or even illegal entities in violation of self-determination (e.g. the *Bantustans*).

3.5. The acts or conduct that is to be regarded as beneficial to inhabitants are wide-ranging as long as it is not a disguised attempt at legitimising *status* of the illegal entity.[22] Thus apart from registration of births and deaths and of marriages, it can encompass the 'maintenance of law and order', 'provision of social services (education, health)', 'economic policy', commercial activities etc.[23]

3.6. What has perhaps been a critical concern has related to the exploitation of natural resources by an illegal entity or authority in effective power. The position has generally been that the illegal entity and occupier cannot exploit resources in the territory in question, and any act or conduct in that regard is manifestly *illegal*.

(a) in Namibia, after the termination of its mandate, South Africa had no power to enter into agreements for the exploitation of natural resources in Namibian territory;[24]

(b) in the occupied territories, the United Nations generally treated Israel's exploitation of resources as illegal and unlawful;[25]

(c) in respect of Rhodesia during Ian Smith's regime, concern was expressed by the United Nations over chrome ore;[26]

(d) in respect of East Timor, Portugal did institute proceedings before the International Court against Australia in respect of a treaty concluded by the latter and Indonesia to exploit resources in the 'Timor Gap'.[27]

3.7. The concern over natural resources has thus been a pivotal one in some of the problematic situations in the post-United Nations period. Nonetheless, it is notable that these situations did entail an *official* policy of the illegal entity or authority in effective control in illegal exploitation of resources. Further, there has not been a specific excepting of acts of inhabitants in the exploitation of resources especially as is asserted that right of individuals to harvest timber or mine minerals has traditionally existed in the DRC, and that such activities (and related trading or commercial activities in such resources) have been the mainstay of the *livelihood* of its peoples.

IV. Concept and Parameters of 'Illegality' Revisited

4.1. A conceptual definition of illegality remains crucial in determining which exploitation or trading in DRC natural resources is to be considered or treated as *illegal*. One may vouch a number of positions:

1. that all exploitation that deprives the Congolese peoples of their right to permanent sovereignty over their natural resources is illegal. This is a general exposition of the principle of international law recognised in GA Resns. 1803 and 3218. In effect, if the resources are being *systematically* exploited to detriment of the Congolese peoples (and not their benefit) – whether by the Kinshasa government and its allies (Zimbabwe, Angola, etc); Uganda (and Rwanda) or by any other non-state entities (e.g. rebel groups, foreign companies) – then it is *illegal* exploitation;[28]
2. that exploitation of resources by occupier of territory exercising effective power, where the presence of armed forces in territory of another State has been condemned, is *prima facie* illegal. This is however dependent upon:
   (a) proof that the exploitation is part of *official policy* of the occupier state or that acts of its army officers are *attributable* to the state;
   (b) demonstration that the state is indeed in a situation of occupation and thus international law rules on occupation apply to proscribe any exploitation of resources;
3. that certain activities involving the exploitation – extraction, production, trading – in natural resources of a territory not in the *de facto* control of the *legitimate state* [29] to be excepted from the realm of *illegality* if such exploitation is beneficial to inhabitants (e.g. allow for provision of social services – education, health, infrastructure) or that it is part and parcel of the *normal and daily life*, [30] *wage-earning employment or activities* of the inhabitants of the territory. In effect, even activities that are taking place without the consent of the legitimate government may be legal if they meet this criterion. In effect, the Panel's definition of illegality in its first element can be taken as only partially correct, with the second part of that definition being not entirely correct in light of the practical realities of societal existence (requiring that activities that support livelihood of a

people should continue being carried out) and more so in the specific peculiarities of the DRC.

4. that exploitation of resources must in the event that it meets element 3 above must be undertaken under a clear regulatory framework put in place by occupier state or other authority in *effective power* (e.g. rebel groups). The existence of a regulatory framework established and put in place by groups such as RCD, MLC, etc. must be ascertained. Otherwise, an absence of such a framework permits for lawless and arbitrary acts in exploitation of resources. If there are regulations requiring exploitation of timber with licence, then *harvesting and extraction* of timber without a licence or one granted by one who has no authority to grant it should be regarded as unlawful and thus illegal. In the finality, such acts would revert to element 1 above.

V. Concluding Remarks

5.1. What amounts to illegality remains problematic given implications of the various United Nations resolutions and the Lusaka Agreement. The Security Council has consistently condemned the presence of Uganda (and Rwanda) armed forces in DRC. On the other hand, the Lusaka agreement supposedly vests administrative authority in the rebel groups signatory to the agreement. In this regard, the Uganda government has remained insistent that it has no administrative role in the DRC (at least after Lusaka agreement) while its conduct remains at least ambivalent in that regard. Uganda thus escapes the status of an occupier state, as is traditionally the case of a state whose forces occupy another state's territory (e.g. Israel). Nonetheless, in-fighting between rebel groups (and factions within groups) has left a very fluid situation which in itself poses the question of existence of effective *administrative structures* in several parts of eastern DRC. This seems to have left a vacuum of authority in which lawlessness and arbitrary acts in the exploitation of DRC resources thrives, and thus left any concept of *illegality* highly fluid in itself.

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[1] The position taken at the League of Nations was that Japan's action was a violation of the prohibition on non-use of force contained in the Covenant and the Pact of Paris: LNOJ Special Supp. No. 101/I, 81, 11 Mar. 1932.

[2] See, e.g. *Illegality (and voidness) of treaties concluded under coercion* in violation of the principles of the UN Charter: Vienna Convention on the Law of Treaties, 1969, art. 52.

[3] *Legal Consequences for States of the Continued Presence of South Africa in South West Africa notwithstanding Security Council resolution 667(1970)*, adv. op. [1971] ICJ Rep. 6 (here-inafter *Namibia case*)

[4] See e.g. Resolution on the so-called Independent Transkei and other Bantustans, GA Res. 31/6, 26 Oct. 1976.

[5] See e.g. GA Res. 32/5, 1 Nov. 1977; SC Res. 446 (1979), 22 Mar. 1979.

[6] The illegality would inure from the existing condemnation contained in the numerous Security Council resolutions, but generally on the principle of international law on the non-recognition of acquisition of territory by the use or threat of force. This intention is apparently denied by Uganda (and Rwanda) according to press reports on the matter: E. Allio, 'Uganda, Rwanda dismiss plot to annex Congo', *The New Vision*, 5 Dec. 2000.

[7] The Expert Panel was constituted by the UN Secretary-General on 31st July 2000 (letter to the President of the Security Council: S/2000/796) in response to a request by the Security Council (letter by President of the Security Council to the Secretary General: S/PRST/2000/20), 2 June 2000). The Expert Panel submitted its report through the Secretary-General on 12 April 2001: S/2001/357.

[8] Expert Panel report, para. 15.

[9] Id.

[10] Id.

[11] Ibid., para. 15(a). The Panel refers for this element to the statement of the President of the Security Council of 2 June 2000.

[12] See e.g. Security Council resolutions: SC Res. 1234 (19990, 12 Apr. 1999; SC Res. s1304 (2000), 16 June 2000.

[13] Expert Panel report, para. 15.

[14] Ibid., para. 15(b).

[15] Ibid., para. 15(c).

[16] Ibid., para. 15(d).

[17] This principle is stated in several resolutions of the United Nations dating as far back as 1960s: e.g. Resolution on Permanent Sovereignty over Natural Resources, GA Res. 1803 (XVII) (1962); Charter on the Economic Rights and Duties of States, GA Res. 3281 (XXIX) (1974). The principle as *right of peoples* is conceived in human rights treaties: e.g. International Covenant on Civil and Political Rights (ICCPR) (1966), art. 47; International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966), arts. 1(2) and 25; African Charter on Human and Peoples' Rights, 1981, art. 21.

[18] Namibia case, supra, note 3, paras. 123-4.

[19] Ibid., para. 127.

[20] Ibid., para. 125.

[21] In any event, international law has in fact taken analogies from municipal law – with the most prominent example often given being the years of the American civil war (1862-70), whereby after the conclusion of the civil war, the courts recognised the legality and validity of the acts and conduct of the renegade (rebel) southern states on the premise of the doctrine of 'necessity'. The cases pertaining to the American civil war are largely referred to in the case of *Uganda v. Commissioner of Prisons, ex parte Matovu* [1966] EA 514.

[22] Thus in respect of Rhodesia, issuance of passport was included in the 'illegal' acts, as it tended to lend legitimacy to Ian Smith's UDI as a mark of statehood (only a state can confer nationality and citizenship). It was then still taken that Rhodesians were British protected persons.

[23] Detention of an individual under *preventive detention* laws: *Madzimbamuto v. Lardner-Burke* (1969) Ac 645 (Rhodesia). Of course, concerns were expressed over the non-usurpation of the *authority of the lawful sovereign*: *per* Lord Pearce. See also trial of an individual for treasonable offences: *Binga v. The Administer-General for South West Africa & Ors* (1984) 82 ILR 464 (Namibia). The economic policy (e.g. market-orientation, taxation, currency) should not however seem a disguised attempt to unify the economy of the occupier state with that of the occupied territory – this was apparent in the criticism of the tax policies of Israel with respect of the occupied territories. See also on export/import trade with Northern Cyprus: *R v.*

Minister of Agriculture, Fisheries & Food, ex parte SP Anastasiou (Pissouri) Ltd. & Ors (1994) 100 ILR 264.

[26] Namibia case, supra, note 16. In fact, the United Nations established the United Nations Council for Namibia. The Council adopted Decree No. 1 for the Protection of the Natural Resources of Namibia, 27 Sept. 1974 which was endorsed by the UN General Assembly: GA Res. 3295 (XXIX), 13 Dec. 1974.

[27] See e.g. GA Res. 3171 (XXVIII), 17 Dec. 1973.

[28] See e.g. concerns expressed over import of chrome from Rhodesia by the United States: SC Res. 232 (1966)

[29] *East Timor case* (Portugal v. Australia) [1992] ICJ Reports. The essence of the Portuguese claim was that the treaty would violate the right of the *East Timorese* people to permanent sovereignty over natural resources.

[30] One can draw reference to the exploitation of phosphate by the administering powers, New Zealand, Australia and United Kingdom in Nauru: *Phosphates in Nauru case* (Nauru v. Australia) [1991] ICJ Reports.